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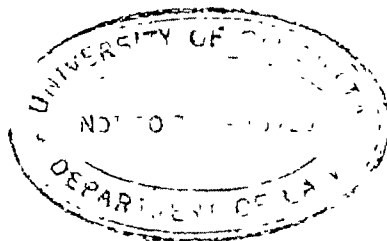
DECIDED BY THE JUDICIAL COMMITTEE OF
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FROM INDIA

AND

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WILLIAM IN BENGAL.

VOL. XXVI.

1917.

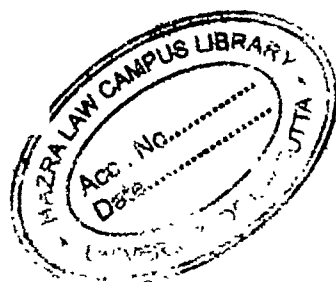


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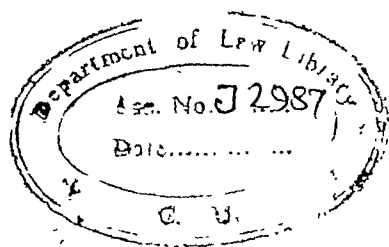
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LP1833



JUDGES OF THE HIGH COURT.

1917.

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November 1st, 1917).

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1917.

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The Calcutta Law Journal

Reports.

PRIVY COUNCIL.

PRESENT:—*Viscount Haldane, Lord Shaw, Sir John Edge and
Mr. Ameer Ali.*

SAHU RAM CHANDRA AND ANOTHER

v.

BHUP SINGH AND OTHERS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE FOR THE
NORTH-WESTERN PROVINCES, ALLAHABAD].

*Alienation—Hindu Law—Mitakshara—Joint family property—Father's power
of alienation—Mortgage or sale for an antecedent debt—Antecedent debt—
Mortgage of joint family property by father—Liability of sons in suit to
enforce such a mortgage—Pious obligation of sons to discharge their father's
debts only arises on father's death—Legal necessity—Burden of proof.*

Under the law of the Mitakshara the joint family property, which is owned by all the members of the family as co-parceners, cannot be the subject of a gift, sale or mortgage by one co-parcener except with the consent, express or implied, of all the other co-parceners. Any deed of gift, sale or mortgage granted by one co-parcener on his own account of or over the joint family property is invalid; the estate is wholly unaffected by it, and its entirety stands free of it.

The father, in his capacity of manager and head of the family, is at liberty to affect or dispose of the joint family property for estate or family necessity, but otherwise he has no power of sale or mortgage except for an antecedent debt. The father's power of affecting or disposing of the joint family property for necessary purposes, is analogous to that of the power vested in the head of a religious endowment or *mush*, or of the guardian of an infant family. In all of the cases where it can be established that the estate itself that is under administration demanded, or the family interests justified, the expenditure, then those entitled to the estate are bound by the transaction. Where estate or family necessity exists, that necessity rests upon the co-parceners as a whole, and it is

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proper to imply a consent of all of them to that act of the one which such necessity has demanded.

A borrowing made on the occasion of the grant of a mortgage is not such an antecedent debt. The exception applies only to the case where the father's debt has been incurred irrespective of the credit obtained from the joint family property. In order to validate a mortgage for an antecedent debt not only antecedency in time but real dissociation in fact is required.

The obligation of religion and piety which is placed upon sons and grandsons under the Mitakshara Law, to discharge their father's and grandfather's debts, does not attach while the said father and grandfather are alive.

The doctrine of *onus probandi*, in cases where legal necessity is alleged, is largely based upon the necessity of protecting the rights of third persons who have taken their title for onerous consideration and in good faith. There is no hard and fast rule, and the presumption proper to be made must depend on the circumstances of each case. In the present case, where the mortgagees sued after 27 years, nothing having been done on the mortgage in the interval, the *onus* of proving legal necessity was laid on plaintiffs, mortgagees: *Chandradeo Singh v. Mata Prasad* (1) approved.

Ex parte appeal from a decree of the Allahabad High Court, confirming a decree of the Subordinate Judge of Mainpuri.

Bhup Singh (defendant No. 1) was father or grandfather of the remaining defendants. Defendants were a joint Hindu family of which Bhup Singh was the head. In 1882 Bhup Singh hypothecated to Thakur Churan Singh one biswa zemindari share in Mouza Pendat, which share was the property of the joint family. In 1883 he mortgaged the said property to one Bhagirath for Rs. 200 bearing interest at Re. 1-8-0 per cent. per mensem. The mortgage deed recited that he did this "to meet his necessity." In 1884, he again mortgaged the said property to the plaintiff Sahu Ram Chandra. In 1893 the latter sued on his mortgage and got a mortgage decree subject to his redeeming Bhagirath's mortgage, the amount due thereunder was then fixed at Rs. 200 principal and Rs. 37-10-0 interest. Sahu Ram Chandra paid this, and the mortgage deed in favour of Bhagirath was thereupon made over to him. Plaintiffs sued on Bhagirath's mortgage in 1910 and alleged that nothing had been paid and that the amount due was Rs. 22,131-9-0. They valued the suit however at Rs. 19,000 only, on the allegation that the mortgaged property was not worth more. They alleged that the loan was taken "to meet a lawful necessity." This the defendants denied. They also set up a settlement of the whole matter.

The Subordinate Judge disbelieved the defendants' evidence as to this settlement, but he held that the burden of proving

(1) (1909) I. L. R. 31 All. 176 F. B.

necessity was on plaintiffs and that they had failed to discharge it. He accordingly dismissed the suit.

Plaintiffs appealed to the Allahabad High Court, but their appeal was dismissed. They therefore preferred the present appeal to the Privy Council.

De Gruyther, K. C., (*W. A. Raikes* with him) for the appellants: My propositions are: (1) A son is bound to pay his father's debt unless it is contracted for immoral purposes, and (2) a father can dispose of family property for an antecedent debt.

The Courts in India have differed as to what is an antecedent debt. Where there is a mortgage there is a loan; the mortgage is therefore given for an antecedent debt. The mortgage in question was a simple mortgage as defined in section 58 (b) of the Transfer of Property Act, and not as in England a conveyance subject to the right to redeem.

It has been found the mortgage was not for necessity, and it is on the question as to the *onus* of proving necessity that the case has turned in the lower Courts: but it does not really turn on necessity at all. What I rely on is the second ground of appeal to the High Court, that quite irrespective of necessity "it was for the sons and grandsons of Bhup Singh, the mortgagor, to set up and prove the invalid nature of the debt before they could resist the claim for sale of the property."

There is no doubt whatever that the father can sell the family property outright for his antecedent debt: the point is whether he can mortgage it. The High Court on the authority of *Chandra-deo Singh v. Mata Prasad* (1), have held that he cannot, they held that a debt is not antecedent "if it is incurred at the time of the mortgage." I submit this view is wrong, and that a mortgage is necessarily for an antecedent debt.

That a mortgage for an antecedent debt can be enforced appears from this Board's judgment in *Bhagbut Pershad v. Mussummat Girja Koer* (2), where the question was whether the burden was on the sons to prove the immoral nature of the debt or on the mortgagee to prove necessity, and it was held that the burden was on the sons and grandsons.

The foundation of the obligation is the pious duty of the son to pay his father's debts. The subject is discussed in section 303 of Mayne's Hindu Law, and the following decisions of this Board are in point: *Hunoomanpersaud v. Mussummat Babooee Munraj*

(1) (1909) I. L. R. 31 All. 176 F. B.

(2) (1888) L. R. 15 I. A. 99; I. L. R. 15 Calc. 717.

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Keonwares (1), which laid down two propositions (1), that the son is bound to pay the father's debts, and (2) that the father can mortgage the family property to discharge his own debts. See also *Girdharee Lal v. Kantoo Lal* (2); *Suraj Bansi Koer v. Sheo Prashad Singh* (3); *Mussummat Nanomi Babwasin v. Moqun Mohun* (4); *Meenakshi Naidu v. Immudi Kanaka Ramaya Kounden* (5) and *Rai Babu Mahabir Pershad v. Rai Markunda Nath Sahai* (5).

The Full Bench decision of the Allahabad High Court in *Chandradeo v. Mata Prasad* (7), reviews all the decisions up to that date. That decision itself was a decision of three Judges against two. The question has sometimes been treated as one of the burden of proof, but I submit it is not so much that, as a question of what you have to prove.

[Viscount Haldane:—The point raised by Stacchey C. J. and Stanley C. J. is, whether a mortgage for an immediate advance is more of the nature of an alienation or of a debt.]

The cases are all founded on the son's liability to pay debts, not on his liability to pay antecedent debts. I contend that in every mortgage there is an antecedent debt, but if that be held against me, I contend further that the distinction of debt and antecedent debt is immaterial. If a sale is for debt of course the debt must be antecedent: it does not follow that a mortgage is invalid because the debt is not antecedent. In *Babu Singh v. Bihari Lal* (8) and in *Dattatraya Vishun v. Vishun Narayan* (9), there was no antecedent debt, yet the mortgages were enforced against the sons: the latter decision of the Bombay High Court is subsequent to the Allahabad Full Bench decision from the principle of which this is practically an appeal.

[Viscount Haldane: Is there any decision of this Board which treats the bond in a mortgage as an antecedent debt?].

Not where the point has been specifically raised. But it has in fact been so treated in *Bhagbut Pershad v. Musummat Girja*

(1) (1856) 6 M. L. A. 393 (421).

(2) (1874) L. R. 1 I. A. 321; 22 W. R. 56.

(3) (1879) L. R. 6 I. A. 88 (104); I. L. R. 5 Calc. 148.

(4) (1885) L. R. 13 I. A. 1; I. L. R. 13 Calc. 21.

(5) (1883) L. R. 16 I. A. 1; I. L. R. 12 Mad. 142.

(6) (1889) L. R. 17 I. A. 11; I. L. R. 17 Calc. 584.

(7) (1909) I. L. R. 31 All. 176.

(8) (1908) I. L. R. 30 All. 156.

(9) (1911) I. L. R. 36 Bom. 68.

Koer (1) and in *Meenakshi Naidu v. Immudi Kanaka Ramaya Kounden* (2).

The question now at issue was considered by a Full Bench of the Calcutta High Court in *Luchmun Dass v. Giridhur Chowdhri* (3), and decided against me. That decision was followed at Calcutta till the decision in *Maheshwar Dutt Tewari v. Kishun Singh* (4), where the Judges held that it had been overruled by later decisions of the Privy Council.

Another Bench of the same High Court however, in *Kishun Pershad Chowdhry v. Tipan Pershad Singh* (5), dissented from the latter decision, and held that the old Full Bench decision was still binding on them. The point really is, whether there is a debt for which the sons are liable. As to the form of the action in such cases, see *Badri Prasad v. Madan Lal* (6).

The action is brought against the father to enforce the mortgage, and the sons are joined under section 85 of the Transfer of Property Act, as they have an interest in the mortgaged property and in order that further proceedings in execution may bind them. The view of the Calcutta High Court is that there should be a personal money decree. Turning to the Madras decisions, *Venkataramanaya Pantulu v. Venkataramana Doss Pantulu* (7), merely follows, without any additional reasoning, the decision in *Sami Ayyangar v. Pennamal* (8), which is against my contention; was dissented from in *Chidambara Mudaliar v. Koothaperumal* (9), which is in my support.

[Lord Shaw: This Board's decisions deal with cases where third parties have derived rights and the sons come to challenge].

There was no third party in *Bhagbut Pershad v. Mussummat Girja Koer* (1).

W. A. Raihes followed: There is documentary evidence, not dealt with by either of the lower Courts, supporting our contention that there was necessity for the mortgage.

[Lord Shaw: There are concurrent findings of fact on that issue].

The Respondents did not appear.

(1) (1888) L. R. 15 I. A. 99; L. L. R. 15 Calc. 717.

(2) (1888) L. R. 16 I. A. 1.

(3) (1880) L. L. R. 5 Calc. 855.

(4) (1907) L. L. R. 34 Calc. 184.

(5) (1907) I. L. R. 34 Calc. 735.

(6) (1893) I. L. R. 15 All 75 F. B.

(7) (1905) I. L. R. 29 Mad. 200.

(8) (1897) I. L. R. 21 Mad. 29.

(9) (1903) I. L. R. 27 Mad. 336.

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Their Lordships' judgment was delivered by

Lord Shaw :—This is an appeal from a judgment and decree of the Allahabad High Court, dated the 26th May, 1913, which confirmed on an appeal the judgment and decree of the Subordinate Judge of Mainpuri, dated the 29th February, 1912.

The suit is brought to enforce a mortgage granted so far back as the 6th January, 1883, over, *inter alia*, one biswa zemindari share in Mouza Pendat, Pergana Mustaphabad. The mortgage was granted in favour of one Bhagirath. It was paid off by Ram Chandra, one of the defendants, in the course of an action brought by him to enforce a subsequent security granted over the same property. It appears from the judgment appealed from that the plaintiffs proceeded against the property comprised in their own mortgage and that the decree-holders purchased the property themselves. All this happened over twenty years ago. It is manifest from these facts that, in so far as the advance of 200 rupees was concerned, a claim for repayment of it as a simple debt would be long ago barred by limitation.

Accordingly, it is the mortgage which is sued upon, and the plaintiffs claim as standing in right of it, they having discharged the debt of Bhagirath, the original mortgagee. Their Lordships had not the advantage of hearing any argument in support of the judgment appealed from, the respondents not being represented by counsel; but there is sufficient in the case to suggest that other elements going to dispute the validity of the appellants' claim might have been brought before the Board. Their Lordships, however, were willing to consider the arguments submitted to them upon the one particular point hereafter to be explained, and they agree with the argument of the learned counsel for the appellants that, in view of a certain conflict of decisions in the various Courts in India, it may be well that the point should be settled.

The mortgagor was the defendant, Bhup Singh. The other defendants are his sons and grandsons. Under the Mitakshara Law they are, as members of a joint family, coparceners in the ownership of the property over which the mortgage was granted.

It is well to keep the general principle applicable to such a situation in mind. There have been so many decisions by Courts of law on the exception to the principle that the principle itself has been apt to be forgotten. Under the Law of the Mitakshara the joint family property owned, as stated by all the members of the family as coparceners, cannot be the subject of a gift, sale, or mortgage by one coparcener except with the consent, express or implied,

of all the other coparceners. Any deed of gift, sale, or mortgage granted by one coparcener on his own account of or over the joint family property is invalid; the estate is wholly unaffected by it, and its entirety stands free of it.

The rule of the Mitakshara is clear (I, 1, 27): even the father—
“is subject to the control of his sons and the rest in regard to the immovable estate, whether acquired by himself or inherited from his father or other predecessor; since it is ordained ‘though immovables or bipeds have been acquired by a man himself a gift or sale of them should not be made without convening all the sons.’”

The law of the Mitakshara has, however, given to the father in his capacity of manager and head of the family certain powers with reference to the joint family property. The general principle in regard to that matter is that he is at liberty to affect or to dispose of the joint property in respect of purposes denominated necessary purposes. The principle in regard to this is analogous to that of the power vested in the head of a religious endowment or *muth*, or of the guardian of an infant family. In all of the cases where it can be established that the estate itself that is under administration demanded, or the family interests justified, the expenditure, then those entitled to the estate are bound by the transaction. It is not accurate to describe this as either inconsistent with or an exception to the fundamental rule of the Mitakshara. For where estate or family necessity exists, that necessity rests upon the coparceners as a whole, and it is proper to imply a consent of all of them to that act of the one which such necessity has demanded.

This view is in no way novel. In *Suraj Bansi Kaer v. Sheo Pershad Singh* (1), Sir James Colville said:—

“All are agreed that the alienation of any portion of the joint estate, without such express or implied authority, may be impeached by the coparceners, and that such an authority will be implied at least in the case of minors, if it can be shown that the alienation was made by the managing member of the family for legitimate family purposes. It is not so clearly settled whether, in order to bind adult coparceners, their express consent is not required.”

But for the exception immediately to be noted, these two principles would cover the ground, and it would be clear that if the father of a family purported or presumed to mortgage or sell the joint family estate, the mortgage or sale would be entirely ineffectual.

Before dealing with that exception, their Lordships desire to note an argument presented, to the following effect. It was argued that

(1) (1879) L. R. 6 I. A. 88; I. L. R. 5 Calc. 148.

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a mortgage was binding because of an obligation of religion and piety which is placed upon the sons and grandsons, under the Mitakshara law, to discharge their father's debts. If, accordingly, he has incurred a debt, and the debt was not for immoral purposes, the pious obligation resting upon the sons and grandsons to discharge this debt is in practice worked out by giving effect to any mortgage or sale of the family property, in which they, with the father, its manager, were joint owners, so as to enable the debt to be discharged.

While the father, however, remains in life, the attempt to affect the sons' and grandsons' shares in the property in respect merely of their pious obligation to pay off their father's debts, and not in respect of the debt having been truly incurred for the interest of the estate itself, which they with their father jointly own, that attempt must fail; and the simplest of all reasons may be assigned for this, namely, that before the father's death he may pay off the debt, or after his death there may be ample personal estate belonging to the father himself out of which the debt may be discharged. In short, responsibility to meet the father's debts is one thing, and the validity of a mortgage over the joint estate is quite another thing. Accordingly, the case founded merely upon pious obligation, and so strenuously argued before the Board, fails in the present instance by reason of the fact that Bhup Singh, who contracted the debt, is still alive, and that there is a concurrent finding by both of the Courts below to the effect that the plaintiffs have failed to prove that the debt of 200 rupees, for which the mortgage was granted, was incurred for any legal necessity or benefit to the estate.

The whole of this part of the case is accordingly at an end. But while the principles as above set forth still stand, an appeal is made in this case to the following exception. Although the correct and general principle be that if the debt was not for the benefit of an estate then the manager should have no power either of mortgage or sale of that estate in order to meet such a debt, yet an exception has been made to cover the case of mortgage or sale by the father in consideration of an antecedent debt. This being an exception from a general and sound principle, their Lordships are of opinion that the exception should not be extended and should be very carefully guarded. They desire, in the first place, to make it clear that much if not all of the law upon this subject has arisen from the necessity of protecting the rights of third persons, say the purchasers of the property who have taken their title for onerous consideration and in good faith. This is at the bottom of the

doctrine of onus, which was dealt with so fully by Lord Justice Knight Bruce in *Hunooman Persaud Panday v. Mussumat Babooee Munraj Koonweree* (1).

"According to the argument," said the learned Judge, "if a factum of a deed of charge by a manager for an infant be established and the fact of the advance be proved, the presumption of law is *prima facie* to support the charge and the onus of disproving it rests on the heir."

His Lordship controverts any such general proposition, and decides that the onus of proof in such suits is one—"not capable of a general and inflexible answer. The presumption proper to be made will vary with circumstances and must be regulated by and dependent on them. Thus where the mortgagee himself, with whom the transaction took place, is setting up a charge in his favour made by one whose title to alienate he necessarily knew to be limited and qualified, he may be reasonably expected to allege and prove facts presumably better known to him than to the infant heir, namely, those facts which embody the representations made to him of the alleged needs of the estate and the motives influencing his immediate loan."

The point need not be pursued, because their Lordships are entirely satisfied with the position adopted by the Courts below in the present case.

For the facts are startling. The advance itself was for a trifling amount, namely, 200 rupees, but the interest was 1·8 per cent. per month compound. Accordingly the amount due upon the mortgage, if good and subsisting, was, as stated by the High Court, "the appalling sum of 22,131 rupees." In point of fact, the mortgage is asked to be enforced for a sum of 15,000 rupees. The lapse of time between the date of the mortgage and the date of the suit was 27 years, nothing having been done upon it during that period. The onus was accordingly properly laid and the issue of no benefit to the estate is settled.

As has been already observed, too little weight has been attached to the consideration that, so far as the joint family estate is concerned, the law has been invoked for the protection of third parties, whose rights in or with regard to it have been acquired in good faith. A perusal of the numerous authorities will show that where a joint family property has been sold out and out, or where a decree in execution of the mortgage has been obtained against the property, and rights have thus sprung up with regard to the joint

(1) (1856) 6 M. I. A. 393.

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family estate, these rights are not to be defeated by the members of the joint family simply questioning the transaction entered into by its head. In the case of *Suraj Bunsu Koer v. Sheo Proshad Singh* (1), already referred to, Sir James Colville, "referring to the case of *Girdhari Lull v. Kantoo Lull* (2) observed :—

"1st. That where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debts, cannot recover that property, unless they show that the debts were contracted for immoral purposes, and that the purchasers had notice that they were so contracted; and

"2ndly. That the purchasers at an execution sale, being strangers to the suit, if they have not notice that the debts were so contracted, are not bound to make enquiry beyond what appears on the face of the proceedings."

Their Lordships desire to record their adhesion to the following comment made on this pronouncement by Sir John Stanley in the case of *Chandradeo Singh v. Mata Prasad* (3). The learned Chief Justice stated :—

"The first of these propositions, it will be observed, deals with cases where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father *in consideration of an antecedent debt* or in order to raise money to pay off *an antecedent debt*, or under a sale in execution of a decree for the father's debt. It deals with cases in which ancestral property has passed out of the family, and with no other cases, and the words antecedent debt seem to have been used advisedly. Likewise the second proposition deals with the case of a purchase at an execution sale. Neither proposition touches a case in which a mortgagee of a Hindu father seeks to enforce his mortgage as against the sons."

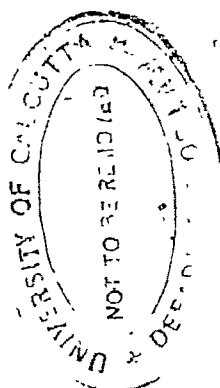
In their Lordships' opinion this is a correct and useful statement of the law.

It need only be further stated that, while the case founded on family necessity is excluded, and while the case founded on pious obligation fails, there is a still more radical objection to the claim. It is denied that the mortgage can be held to have been granted for an antecedent debt. Antecedent debt, it is said, there was none,

(1) (1879) L. R. 6 I. A. 88 ; I. L. R. 5 Calc. 148.

(2) (1874) L. R. 1 I. A. 321 ; 22 W. R. 56.

(3) (1909) I. L. R. 31 All. 176.



and to call a borrowing made on the occasion of the grant of a mortgage antecedent debt is to extend unduly and improperly the whole scope of the exception on that topic. As to this unfortunately there has been much difference of view in the Courts in India.

The law was thus stated by Lord Hobhouse in *Mussumat Nanomi Babuasin v. Modun Mohun and others* (1):

"Destructive as it may be of the principle of independent coparcenary rights in the sons, the decisions have, for some time, established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt, or against his creditors' remedies for their debts, if not tainted with immorality. On this important question of the liability of the joint estate, their Lordships think that there is now no conflict of authority."

In their Lordships' opinion these expressions, which have been the subject of so much difference of legal opinion, do not give any countenance to the idea that the joint family estate can be effectively sold or charged in such a manner as to bind the issue of the father, except where the sale or charge has been made in order to discharge an obligation not only antecedently incurred, but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate. The exception being allowed, as in the state of the authorities it must be, it appears to their Lordships to apply, and to apply only, to the case where the father's debts have been incurred irrespective of the credit obtainable from immovable assets which do not personally belong to him, but are joint family property. In their view of the rights of a father and his creditors, if the principle were extended further, then the exception would be made so wide as in effect to extinguish the sound and wholesome principle itself, viz., that no manager, guardian, or trustee can be entitled for his own purposes to dispose of the estate which is under his charge. In short, it may be said that the rule of this part of the Mitakshara law is that the joint family estate is in this position: under his management he can neither obtain money for his own purposes for it nor can he obtain money for his own purposes upon it. To permit him to do so would enable him to sacrifice those rights which he was bound to conserve. This would be equivalent to sanctioning a plain and, it might be, a deliberate breach of trust. The Mitakshara law does not warrant or legalise any such transaction.

The limits of the principle of the exception have been thus

(1) (1885) L. R. 13 I. A. 1; 1 L. R. 13 Calc. 21.

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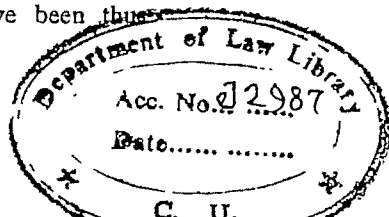
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set forth because in their Lordships' opinion they form a guide to the settlement of the conflict of authority in India on the subject of antecedent debt. In the present case the question arises clear from all complications. A mortgage has been granted for 200 rupees advanced at the time and on the faith of it. This debt was not for the benefit of the estate, it was purely a debt of the father. It is boldly contended that the mortgage did from its date properly hypothecate the entirety of the joint family estate, and it is said that the transaction substantially is that the father got the 200 rupees into his hands, and that when he granted the mortgage he was accordingly an "antecedent debtor." Their Lordships are of opinion that the contention cannot be upheld.

The importance of the case being free from complications is this: that except under the mortgage all other remedies have long ago disappeared, and the appellants rear it up and claim under it now, there being no right in them to invoke the doctrine of the pious obligation to discharge the debt incurred by Bhup Singh, because that debt as such cannot be successfully sued for. Accordingly, unless the mortgage validly affects the joint family estate, the appellants must fail. In the view taken by the Board the mortgage was not granted in respect of an antecedent debt, and was invalid.

The conflict of authorities cited to the Board is a conflict which occurs, not merely between the Courts of one district in India and another, but also between decisions pronounced in Calcutta itself, in Allahabad itself, and in Madras itself. The cases particularly mentioned were as follows :—

Luchmun Dass v. Giridhur Chowdhury (1), *Maheswar Dutt Tewari v. Kishun Singh* (2), *Babu Singh v. Bihari Lal* (3), *Chandradeo Singh v. Mata Prasad* (4), *Sami Ayyangar v. Ponnammal* (5), *Chidambara Mudaliar v. Koothaperumal* (6), *Venkataramanaya Pantulu v. Venkataramana Doss Pantulu* (7), *Dattatraya Vishnu v. Vishnu Narayan* (8).

From this mass of authority their Lordships venture to refer to the judgment of Chief Justice Sir John Stanley, in *Chandradeo Singh v. Mata Prasad* (4), already mentioned :—

"The true rule," says that learned Judge, "is that the son cannot impeach an alienation of ancestral joint family property made by a father for which the consideration is an antecedent debt of the father not tainted with immorality or the object of which is to pay such a

(1) (1880) I. L. R. 5 Calc. 855.

(3) (1908) I. L. R. 30 All. 156.

(5) (1897) I. L. R. 21 Mad. 28.

(7) (1905) I. L. R. 29 Mad. 200.

(2) (1907) I. L. R. 34 Calc. 184.

(4) (1909) I. L. R. 31 All. 176.

(6) (1903) I. L. R. 27 Mad. 326.

(8) (1911) I. L. R. 36 Bom. 68.

debt.....the doctrine has no application to a case in which no antecedent debt of the father, that is, a debt antecedent to the alienation in question, is concerned as the consideration or object of the alienation."

The argument in support of the validity of the mortgage also took this shape. It was said, "What difference would it make if the father had contracted the debt an hour, a day, a year before granting the mortgage?" Then *de facto* it would be an antecedent debt, and the creditor would have a mortgage good upon that ground. Their Lordships cannot assent to any such proposition that a mortgage on the family estate would follow the loan. The case as put might instantly raise the presumption that what occurred was substantially this: that the father contracted the debt knowing that he was at the end of his personal resources and that the creditor advanced the money relying upon an understanding or agreement, express or implied, given to the father. In truth, in order to validate such a transaction of mortgage there must, to give true effect to the doctrine of antecedency in time, be also real dissociation in fact. The Courts in India, wherever such antecedency is found to be unreal and is merely a cover for what is essentially a breach of trust, will not be slow to deny effect to a mortgage so brought into existence.

Their Lordships will humbly advise His Majesty that the appeal be disallowed.

T. C. Summerhays & Son:—Solicitors for the Appellants.

The Respondents did not appear.

J. M. P.

Appeal dismissed.

PRESENT:—*Viscount Haldane, Lord Atkinson, Lord Shaw,
Lord Parmoor and Mr. Ameer Ali.*

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THE KING-EMPEROR.

[ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER,
CENTRAL PROVINCES.]

*Code of Criminal Procedure (Act V of 1898), S. 172—Evidence—Police diary—
Statements made to the police officer—Practice of the Judicial Committee—
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A diary made by the investigating police officer under section 172 of the Code of Criminal Procedure, may be used under that section to assist the Court which tries the case by suggesting means of further elucidating points which need clearing up, and which are material for the purpose of doing justice between the Crown and the accused, but not as containing entries which can by themselves be taken to be evidence of any date, fact, or statement contained in the diary. The police officer who made the diary may be confronted with it, but not any other witnesses.

Queen-Empress v. Mannu (1) approved.

Held, accordingly, that in deciding an appeal against a death sentence and in confirming that sentence the High Court went wrong in testing the credibility of the witnesses called at the trial by reading the statements made by such witnesses to the police and entered in the police diary, and in treating what was thus entered as evidence for that purpose.

The Judicial Committee is in general not a Court of review in criminal cases, but while it does not interfere merely on the question whether the Court below has come to a proper conclusion as to guilt or innocence, it ought to interfere where there has been a disregard of the proper forms of legal process, grievous and not merely technical in character, or a violation of principle in such a fashion as amounts to a denial of justice. But in hearing criminal appeals the Judicial Committee would not act in the free fashion of a fully constituted Court of criminal appeal.

Where the error in procedure is of a grave character, as for example, when it deprives an accused of a constitutional or statutory right to be tried by a jury, or by some particular tribunal; or where the error in procedure is carried to such an extent as to cause the outcome of the proceedings to be contrary to fundamental principles which justice requires to be observed, the Judicial Committee, even if they thought the accused guilty, would not hesitate to recommend the exercise of the prerogative of the Sovereign. But where the error in procedure consists only in the fact that evidence has been improperly admitted, which was not essential to a result which might have been come to wholly independently of it, the Judicial Committee would not advise the Sovereign to interfere.

Appeal by special leave from a judgment of the Court of the Judicial Commissioner, Central Provinces, dated April 19, 1916, dismissing an appeal from a judgment of the Court of Sessions, Jubbulpore Division, dated February 24, 1916, whereby the appellant Dal Singh was convicted of the murder of a woman called Kalia, the wife of Mohan, under section 302 of the Indian Penal Code and sentenced to death, and confirming that sentence.

The facts are sufficiently stated in the judgment of their Lordships. By an order of the 1st Class Magistrate, Jubbulpore, dated November 19, 1915, five accused persons were committed for trial at the said Court of Sessions, two of them, Dal Singh (the appellant) and Bhojraj on charges under section 148 (rioting with deadly

(1) (1897) I. L. R. 19 All. 390, F. B.

weapons) and section 302 (murder), and the remaining three Shankar, Nanhe and Mithua under section 147 (rioting) of the Indian Penal Code. All the five were jointly tried by the Sessions Judge with the aid of two assessors. At the end of the case the assessors gave it as their opinion that none of the accused were guilty. They said they thought Mohan had murdered his wife in order to implicate the appellant. One of them added that Mohan had been telling an untruth and that the whole case for the prosecution was false; and the other said that he did not believe either Mohan or his brother Jhunni, who were the principal witnesses for the prosecution. The Sessions Judge acquitted the accused other than the appellant, whom he found guilty of murder and sentenced him to death. It appeared from the allusions in the judgment that the learned Judge had used the police diary as evidence in the case.

Against the said conviction and sentence the appellant appealed to the Court of the Judicial Commissioner, and the case also came before that Court for confirmation of the sentence under section 374 of the Code of Criminal Procedure. But his appeal was dismissed and the sentence confirmed. In arriving at their conclusions the learned Judicial Commissioners had used police diaries in the case as evidence, and thereby tested the credibility of the witnesses. The appellant thereupon applied for and obtained special leave to appeal to His Majesty in Council.

De Gruyter, K. C., and J. M. Parikh for the Appellant: The Court of appeal has used the police diaries in the case as evidence, and has thereby tested the credibility of the witnesses, with the result that it has believed the prosecution witnesses and disbelieved those for the defence. But a Court of criminal appeal has no power to use as evidence the statements made to the investigating police officer or the contents of his diaries of the case: Code of Criminal Procedure, sections 162 and 172; and *Queen-Empress v. Mannu* (1). It is therefore submitted that the judgment of the Court of appeal is vitiated. The Criminal Procedure Code gives the appellant a statutory right of appeal and also provides by section 374 that the sentence must be confirmed by the High Court, which in this case is the Court of the Judicial Commissioner. The effect of the use of police diaries by the Court of appeal is to deprive the appellant of those statutory rights and such a deprivation constitutes grave and substantial injustice, and it is submitted that the case falls within

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rule of practice of the Board as laid down in *In re Dillat* (1). See also *Arnold v. King-Emperor* (2).

It may be that the judgment of the Sessions Judge falls short of the rule of practice of the Board. But the appellant is entitled to have his conviction considered by a Court of criminal appeal, and his sentence confirmed by the Court of the Judicial Commissioner. The Board not being a Court of criminal appeal it is submitted that the judgment of the Court below should be set aside and the case sent down for rehearing the appellant's appeal against his conviction and confirmation of his sentence. If, however, the Board decides to consider whether the conviction is right, the Board should do so as if it were a Court of criminal appeal and thus safeguard the appellant's statutory rights. It is submitted that no Court of criminal appeal could or would uphold the conviction and confirm the sentence. Reference was also made to the Code of Criminal Procedure, sections 154, 156, 161, 376 and 439.

The information laid by the appellant before his arrest is not admissible in evidence under section 25 of the Indian Evidence Act, as it is a confession made to a police officer. An admission by an accused person of any fact which may tend to the proof of his guilt is a confession: Archbold's Criminal Pleadings, Evidence and Practice, Ed., 1910, p. 391. Here Dal Singh's information contains admission of several facts which tend to prove his guilt, and is therefore not admissible.

Sir Erle Richardson, K. C. and *Sir W. Garth* for the Respondent:

[Lord Haldane asked counsel to address the Board on the following points: (1) Whether in the Court of appeal where the diaries were extensively used, the courses adopted were justified? (2) The diaries being so used what is the effect on the proceedings in the appeal and on confirmation? (3) What is the position of the Board having regard to the case of *In re Dillat* (1).]

As to (1) it is submitted that both the Sessions Court and the Court of appeal had power under section 172 to use the diaries to aid the Court. As to (2) the statements made to the police are not used as evidence; but even if they were so used, it is submitted that apart from police diaries there was evidence in the case on which the Court of appeal could and would have come to the same conclusion, and the Board would be justified in maintaining the confirmation: See Indian Evidence Act, section 167. There is

(1) (1887) L. R. 12 App. Cas. 459.

(2) (1914) L. R. 41 I. A. 149; 20 C. L. J. 161.

no injustice, substantial or otherwise, done in this case. With regard to (3) it must be shown that there was a substantial defect in the procedure which goes to the root of the case, and that owing to that defect there has been miscarriage of justice. But here there has been no defect contrary to natural justice, and the use of the police diaries added a little colouring, but did nothing contrary to natural justice. The case does not come within the rule of practice as laid down in *Dillet's case* (1), *Arnold v. King Emperor* (2), and *Ibrahim v. King-Emperor* (3). Reference was also made to various sections of the Code of Criminal Procedure including section 4 (k), and those in clauses 18, 22, 23 and 31.

De Gruyther, K. C., replied referring to *Ibrahim v. King-Emperor* (3), *Makin's case* (4), and *Subramania Iyer v. King-Emperor* (5).

The judgment of their Lordships was delivered by

Viscount Haldane :—In this case the appellant was convicted of murder by the Sessions Court of Jubbulpore, and was sentenced to death. The Court of the Judicial Commissioner of the Central Provinces heard an appeal and dismissed it, and confirmed the sentence under the provisions of the Indian Code of Criminal Procedure.

A petition for leave to appeal was presented to the King in Council. It was argued before this Board in support of the petition that the judgments in the Courts in India had been vitiated by an illegal and prejudicial use of the police diaries in the case, and that the credibility of the witnesses had been thereby wrongly estimated. What had taken place, it was alleged, had led to such a miscarriage of justice as to bring the conviction within the exceptional class of cases in which His Majesty in Council will review the proceedings in a criminal trial in India.

It is well settled that the unwritten principles of the Constitution of the Empire restrain the Judicial Committee from being used in general as a Court of review in criminal cases. But while the Sovereign in Council does not interfere merely on the question whether the Court below has come to a proper conclusion as to guilt or innocence, such interference ought to take place where there has been a disregard of the proper forms of legal process, grievous and not merely technical in character, or a violation of principle in such a fashion as amounts to a denial of justice. Their Lordships

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(1) (1887) L. R. 12 App. Cas. 459.

(2) (1914) L. R. 41 I. A. 149 : 20 C. L. J. 161.

(3) (1914) L. R. A. C. 599.

(4) (1894) A. C. 57.

(5) (1901) L. R. 28 I. A. 257 ; L. L. R. 25 Mad. 61.

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have now heard full arguments in the case before them, and have examined the procedure and evidence with some minuteness.

Before considering the result, it is right that they should state what they conceive to be, in a case such as that before them, the character of the limitation of their function. The Constitution of the Empire is tending to develop in the direction of regarding as final decisions given in the local administration of criminal justice. The general principle is established that the Sovereign in Council does not act, in the exercise of the prerogative right to review the course of justice in criminal cases, in the free fashion of a fully constituted Court of criminal appeal. The exercise of the prerogative takes place only where it is shown that injustice of a serious and substantial character has occurred. A mere mistake on the part of the Court below, as, for example, in the admission of improper evidence, will not suffice if it has not led to injustice of a grave character. Nor do the Judicial Committee advise interference merely because they themselves would have taken a different view of evidence admitted. Such questions are, as a general rule, treated as being for the final decision of the Courts below.

In the light of these observations, their Lordships turn to the circumstances in the present case. There is no doubt that, on the 23rd October, 1915, a woman named Kalia, who lived at Hardua, a village near Jubbulpur, was murdered by blows from some such weapon as an axe. The blows were of a deadly character, and one of them almost decapitated her. The prosecution alleged that the blows were delivered by the accused, Dal Singh. The defence was that they came from one Mohan, the husband of Kalia, who was said to have killed his wife in order to lay the foundation of a false charge against Dal Singh.

The case made for the prosecution was shortly as follows: That on the morning of the murder, Dal Singh sent for Mohan, who was one of his tenants, and forced him to work at his (Dal Singh's) granary without payment; that, at the time of the midday meal Mohan went back to his own field, and when sent for by Dal Singh refused to return; that thereafter, about 4 P.M., the accused came to Mohan's field on horseback, accompanied by four servants, with the object of forcing Mohan to return to work; that an altercation then ensued, in the course of which the accused, who had an axe in his hand, attacked Mohan; that the latter climbed up his *marwa* (a platform raised on a framework of poles with bars across them) to escape from him, and while standing on one of the cross-bars was cut on the legs by the accused with the axe; that Mohan shouted

out, and his wife, Kalia, then sought to restrain the accused by clasping him round the waist, and was thereupon killed with axes by the accused and one Bhojraj, a servant of his; that as the accused was remounting his horse to go away, one Jhunni, a brother of Mohan, came up, having been attracted by the latter's cries, and hit the accused on the head with a stick, knocking off his cap and causing him to drop his axe; that the accused then rode away, accompanied by his servants.

The defence was that Dal Singh was not present when the murder was committed, and that Kalia was really killed by her husband, Mohan, for the purpose of getting up a false charge against Dal Singh. Kalia was said to have been blind, and it was contended that it was hardly possible that she could have been able to find and lay hold of Dal Singh in the manner suggested.

The charges laid by the police, and ultimately tried, were that Dal Singh and Bhojraj had rioted with deadly weapons, and had committed murder, and that Shanker, Dal Singh's servant, and Nanhe and Mithua, who were also his servants, and who were alleged to have accompanied him to Mohan's field, armed with *lathis*, or sticks, were guilty of rioting. At the trial Bhojraj and the other servants were acquitted, and comments were made by the Sessions Court Judge on the inconvenience of not being able to deal with the capital charge at a separate trial, in which there would have been greater freedom for the examination of the servants as witnesses. These, however, made statements at the trial which supported the defence set up by Dal Singh, the character of which was briefly as follows: He stated that, on the day of the murder, about two in the afternoon, he was riding on his way from Hardua to Jubbulpore, accompanied by Shanker, who was on foot. When he reached a certain field Mohan and Jhunni, who were stated to have been hiding in the underbush, assaulted him with sticks. On being struck he went on to the station house at Patan, calling at Singhori on the way, where he got his relative, Himmat Singh, to accompany him to Patan. He stated that at the station he reported what had occurred to the native constable there, who took down what he said. The native sub-inspector in charge of the station, Harkishen, says that the report was taken down from Dal Singh's narrative in his (Harkishen's) presence, and was afterwards signed by Dal Singh. The latter had a wound on the head, for the treatment of which he was sent to the neighbouring hospital. Meantime there arrived at the station Jhunni, the brother of Mohan, and one Parbat, who stated in the box that he had been attracted

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to the scene of the murder by the shouting of Mohan, and had been requested to go with Jhunni to report to the police. Jhunni and Parbat reported the murder, and the officer in charge, after questioning them, sent for Dal Singh from the hospital and arrested him.

It is important to compare the story told by Dal Singh when making his statement at the trial with what he said in the report he made to the police in the document which he signed, a document which is sufficiently authenticated. The report is clearly admissible. It was in no sense a confession. As appears from its terms, it was rather in the nature of an information or charge laid against Mohan and Jhunni in respect of the assault alleged to have been made on Dal Singh on his way from Hardua to Jubbulpore. As such the statement is proper evidence against him. The statement is as follows :—

"To-day" (the day on which Kalia was murdered), "at 4 P.M., I went from Hardua, taking my servant, Shanker, son of Girdhari Khangar, with me, to the *kachhra* [field] of Nanha Mallah to call Mohan Mallah; because this morning he had been to work at my place, and, leaving the work before he had finished it, he had run away. His plough had been requisitioned for sowing purposes. I said to him, 'Come to work.' He replied, 'I will not go.' Thereupon I spoke to him harshly, for which Mohan struck me at once with a *lathi* on the right side of my head, and his brother, Jhunni, hit me once with a *lathi* on my back. Therefore I, becoming unconscious, fell from my horse. My servant, Shanker, cried out, and Maniram Kotwar and Bhojraj Lodhi came there. [Thereupon] these people ran away, and Shanker, Bhojraj [and] Maniram raised me and carried me home. And Jhunni and Mohan have beaten their *dukariya* [old woman] with *lathis*, and are making preparations to bring a false case against me. Possibly they are coming to make a report."

It will be observed that this statement is at several points at complete variance with what Dal Singh afterwards stated in Court. The Sessions Judge regarded the document as discrediting his defence. He had to decide between the story for the prosecution and that told for Dal Singh. In considering his judgment, in which the evidence is examined fully, their Lordships do not propose to follow him in examining in that judgment the details he deals with. They have observed no material point in which he appears to have gone wrong. They are aware that the Sessions Judge tried the case with two native assessors who differed from his



conclusion. But these assessors gave no reasons for so differing which their Lordships can consider adequate. The Sessions Judge had before him as witnesses whom he believed, Mohan and Jhunni, who testified to having been present when the murder took place and to the details of the account of it given for the prosecution. He also had before him a number of witnesses called for Dal Singh to establish his version of the events of the afternoon of the day on which Kalia lost her life. The Judge held that their testimony was untrustworthy because of serious discrepancies between the versions given by the various witnesses, and on other grounds. In the main he accepted the narrative given by Mohan and Jhunni, and, as he held, confirmed by the facts established. Their Lordships have scrutinised the evidence in order to see whether any miscarriage of justice of the exceptional kind already defined has taken place. So far from finding any such miscarriage in the proceedings at the trial, they see no reason for differing from the conclusions come to by the presiding Judge, or from the reasons given by him in weighing the credibility of the witnesses. They have formed the same impression as he did of the probabilities of the two stories, as well as of the effect of the medical evidence. Had the decision been given solely on the testimony of the witnesses called at the trial and such documents as were plainly admissible, the proceedings would have given rise to no question of substance. The learned Judge who tried the case gave his judgment to so large an extent on proper materials that, even if, here and there, he alludes to documents which were not properly in evidence, he has in no case done so in such a fashion as to imperil the conclusion at which he arrived, tested by the standard of substantial justice.

But in the Court of appeal further material was brought under consideration, and it is in this connection that more difficult questions have been raised. The Court of appeal might, in their Lordships' opinion, have properly dismissed the appeal on the simple ground that an examination of the evidence on the record disclosed no reason to differ from the finding of the Judge who tried the case. But they were not content to confine themselves to this safe ground, for, although they expressed substantial agreement with the reasons he gave, they went on to take into consideration the police diary made during the preparation of the case and antecedently to the trial. The question which has now to be considered is whether the appearance of this feature in the judgment of the Court of appeal vitiates the judgment and confirmation required by the Criminal Procedure Code.

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Under section 172 of the Code every police officer making an investigation is to enter his proceedings in a diary, and any criminal Court may send for the police diaries of a case under enquiry or trial in such Court, and may use such diaries, not as evidence in the case, but to aid it in such enquiry or trial. Such a diary was kept in the present case, and the Judge who tried it had the diary before him. Under Part VII of the Code an appeal is permitted, subject to certain restrictions, and an appeal was brought to the Court of the Judicial Commissioner in the present case, and was heard by two Judges. By section 374, when the Court of Sessions passes sentence of death the proceedings are to be submitted to the High Court (in this instance the Court of the Judicial Commissioner), and the sentence is not to be executed unless it is confirmed by the High Court. On the 19th April, 1916, the sentence on Dal Singh was confirmed by the Court of the Judicial Commissioner "for the reasons given in our judgment of this date" on the appeal.

Had the Court of appeal simply taken the same course as the Sessions Judge and affirmed his judgment on the evidence on the record, it is evident that the conviction would not have been reviewed by this Board. For, as their Lordships have already stated, there was adequate and proper evidence upon which that Judge could and did convict. The Judges in the Court of appeal considered this evidence, and did not differ on any material point from the view he took of it. But, apparently with the view of making their opinion still more conclusive, they went on, after examining the evidence of the witnesses and testing the credibility of those called for the defence by referring to the discrepancies in the testimony of the witnesses on which the trial Judge had properly dwelt, to test that testimony still further by reading the earlier statements of these witnesses made to the police and entered in the police diary. In other words, they treated what was thus entered as evidence which could be used at all events for the purpose of discrediting these witnesses. In their Lordships' opinion, this was plainly wrong. It was inconsistent with the provisions of section 172 of the Criminal Code. To use the diary for the purpose they did was to contravene the rule laid down in *Queen-Empress v. Mannu* (1), where a full Court pointed out that such a diary may be used to assist the Court which tries the case by suggesting means of further elucidating points which need clearing up, and which are material for the purpose of doing justice between the Crown and

(1) (1897) L. L. R. 19 All. 390.

the accused, but not as containing entries which can by themselves be taken to be evidence of any date, fact, or statement contained in the diary. The police officer who made the entry may be confronted with it, but not any other witness.

The question which arises is, therefore, whether the improper use made of the entries by the Court of appeal is a sufficient reason why the Judicial Committee should recommend interference with the judgment and sentence. In their Lordships' opinion, it is not such a reason. They have already stated that they have no ground for doubting that the trial Judge properly convicted and sentenced Dal Singh. He then had an appeal heard by the proper Court, and the sentence was confirmed by that Court. The conditions of the Code as to jurisdiction have thus been complied with. The Court of appeal had before it evidence on which it placed reliance, and on which it could properly have based its affirmance and confirmation of the conviction. It plainly went wrong in using the diary. Now it is true that error in procedure may be of a character so grave as to warrant the interference of the Sovereign. Such error may, for example, deprive a man of a constitutional or statutory right to be tried by a jury, or by some particular tribunal. Or it may have been carried to such an extent as to cause the outcome of the proceedings to be contrary to fundamental principles which justice requires to be observed. Even if their Lordships thought the accused guilty, they would not hesitate to recommend the exercise of the prerogative, were such the case. But where the error consists only in the fact that evidence has been improperly admitted, which was not essential to a result which might have been come to wholly independently of it, the case is different. The dominant question is the broad one whether substantial justice has been done, and, if substantial justice has been done, it is contrary to the general practice to advise the Sovereign to interfere with the result. The point in the present appeal is therefore whether, looking at the proceedings as a whole, and taking into account what has properly been proved, the conclusion come to has been a just one.

In the result their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed. There will, as hitherto has been usual in such cases, be no order as to costs.

*T. L. Wilson & Co.* :—Solicitors for the Appellant.

*Solicitor, India Office* :—Solicitor for the Respondent.

J. M. P.

*Appeal dismissed.*

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PRESENT: *Lord Parker of Waddington, Lord Sumner, Sir John Edge and Sir Lawrence Jenkins.*

MOTI CHAND AND OTHERS

v.

KHWAJA IKRAM ULLAH KHAN AND OTHERS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE FOR THE NORTH-WESTERN PROVINCES, ALLAHABAD.]

*North-Western Provinces Tenancy Act (U. P. Act II of 1901), Secs. 10, 20 and 83—Sale of mahal—Agreement to surrender ex-proprietary rights, void and unenforceable.*

The policy of the North-Western Provinces Tenancy Act, is to secure and preserve to a proprietor, whose proprietary rights in a mahal or in any portion of it are transferred otherwise than by gift or by exchange between co-sharers in the mahal, a right of occupancy in his *sir* lands, and in the land which he has cultivated continuously for twelve years at the date of the transfer, and such right of occupancy is by the Act secured and preserved to the proprietor, who becomes by a transfer the ex-proprietor, whether he wishes it to be secured and preserved to him or not and notwithstanding any agreement to the contrary between him and the transferee. That policy of the Act is not to be defeated by any ingenious devices, arrangements, or agreements between a vendor and a vendee for the relinquishment by the vendor of his *sir* land or land which he has cultivated continuously for twelve years at the date of the transfer; for a reduction of purchase money on the vendor's failing or refusing to relinquish such lands; or for the vendor being liable to a suit for breach of contract on his failing or refusing to relinquish such lands. All such devices, arrangements, and agreements are in contravention of the policy of the Act and are contrary to law and are illegal and void, and cannot be enforced by the vendee in any civil Court or in any Court of revenue: *Ikram-Ullah Khan v. Moti Chand* (1) affirmed.

Appeal from a judgment of the Allahabad High Court (1) (Karamat Husain and Chamier JJ.) which reversed a judgment of the Subordinate Judge of Azamgarh. The facts of the case fully appear from their Lordships' judgment and that of the High Court. The defendants sold certain zemindari to the plaintiffs and in the sale deed the defendants contracted to relinquish their *sir* and *khudkash* lands and give possession thereof to the plaintiffs or in default the defendants would be liable to damages. The defendants refused to deliver possession of such lands to the plaintiffs, who brought the present suit to recover damages for breach of the covenant. The Subordinate Judge allowed the plaintiffs' claim but the High Court held that the contract to relinquish the *sir* lands was forbidden by law and was illegal and void and dismissed the suit. Hence this appeal.

(1) (1911) I. L. R. 33 All. 695.

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*L. De Gruyther K. C.*, and *B. Dube*, for the Appellants submitted that there was nothing to prevent a tenant from surrendering his exproprietary holding to the zemindar: Section 83 of the North-Western Provinces Tenancy Act in terms provided for surrender of such tenancy. The effect of the contract was that the defendants surrendered the lands which they were authorised by law to do. The defendants were liable to pay compensation for the breach of the contract: the law no doubt prohibited the sale of *sir* lands but the present case was merely of surrender of tenancy. There was a long series of decisions against the appellants' view under Act XII of 1881 and also the new Act II of 1901. Reference was made to the cases cited in the judgment of the High Court and to *Dipan Rai v. Ram Khelawan* (1).

*Abdul Majid* for the Respondents was not called upon.

The judgment of their Lordships was delivered by

**Sir John Edge**:—This is an appeal from a decree, dated the 24th May, 1911, of the High Court of Judicature at Allahabad, which set aside a decree of the Subordinate Judge of Azamgarh, and dismissed the suit of the plaintiffs. The suit was brought to recover damages for an alleged breach by the defendants of an agreement contained in a sale deed of the 2nd May, 1903, by which the defendants had agreed to execute and file a deed of relinquishment of their rights in their "sir" lands in Mouza Khorant, Daulsapur, and Bharthipur, in the district of Azamgarh. The Mouzas in question are mahals within the meaning of "The North-Western Provinces Tenancy Act, 1901" (Act II of 1901).

The defendants, who were the proprietors within the meaning of that Act of Mouzas Khorant, Daulsapur and Bharthipur, and had in those Mouzas considerable "sir" lands in their occupation to which the Act applied, by their deed of the 2nd May, 1903, transferred by sale to the plaintiffs the three Mouzas and all the rights appertaining to the zemindari property. By the deed the defendants also purported to sell to the plaintiffs the zemindari property "together with 'sir' and 'khudkasht' lands, and exproprietary tenancy right without the exception of anything or right"; declared that, "we, the executants, have relinquished our claims and interest in respect of all the 'sir' and 'khudkasht' lands"; and agreed that—

"We shall execute a deed of relinquishment of claim in respect of the 'sir' lands, and shall file an application surrendering the

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holding. If we should make a delay in or take any objection to the filing of an application surrendering the holding or to the execution of the deed of relinquishment of claim in respect of the 'sir' lands, or should we, the executants, our heirs or representatives or successors, keep in our possession any portion of the 'sir' and 'khudkasht' lands, then we and our heirs and representatives and successors shall pay damages in respect thereof at the rate of 16 rupees per bigha. In case of non-payment, the vendees shall have power to bring a suit in a competent Court and to realise the amount of damages at the above rate from the person and property of us the executants, and our heirs and representatives and successors. We, the executants, shall have no objection to pay it."

At the time of the execution of the sale deed of the 2nd May, 1903, the plaintiffs were not nor were any of them proprietors, landholders, or co-sharers in the Mouzas or in any of them.

On the 5th May, 1903, and in pursuance of the agreement in that respect contained in the sale deed of the 2nd May, 1903, the defendants executed a deed of relinquishment, in favour of the plaintiffs, of their claim and right in all their "sir" lands in the three mouzas; they, however, refused to file the deed of relinquishment in the revenue Court, and on the 14th July, 1903, refused to quit possession of the "sir" lands, of which they have since then continued in possession as ex-proprietary tenants. In respect of that refusal to file the deed of relinquishment or to quit possession of the "sir" lands, this suit for damages was brought in the Court of the Subordinate Judge of Azamgarh on the 3rd July, 1909. The damages claimed were at the rate of 16 rupees per bigha, amounting to 9,468 rupees 8 annas, with interest thereon at the rate of 8 annas per centum per mensem from the 14th July, 1903, to the 3rd July, 1909. The total amount of the claim, including interest, was Rs. 12,837 : 5 : 9.

The Subordinate Judge gave the plaintiffs a decree for the amount claimed, with costs, and interest thereon at the rate of 8 annas per centum per mensem to the date of realisation. The High Court, on appeal, holding that the transaction as to the "sir" lands, whether it was to be regarded as an attempted sale of ex-proprietary rights or an agreement to relinquish those rights when they should arise, was unlawful, decided that the claim for damages for breach of the agreement could not be maintained, and dismissed the suit. There was abundant authority for that conclusion to be found in the decisions of the High Court on the effect of Act II of 1901, and of the previous Act XII of 1881.

In section 10 of Act II of 1901 it is enacted, so far as is material for present consideration, that—

"(1). Every proprietor whose proprietary rights in a mahal, or in any portion thereof, whether in any share therein or in any specific area thereof, are transferred, on or after the commencement of this Act, either by sale in execution of a decree or order of a Civil or Revenue Court, or by voluntary alienation, otherwise than by gift or by exchange between co-sharers in the mahal, shall become a tenant, with a right of occupancy in his 'sir' land, and in the land which he has cultivated continuously for twelve years at the date of the transfer, and shall be entitled to hold the same at a rent which shall be four annas in the rupee less than the rate generally payable by non-occupancy tenants for land of similar quality, and with similar advantages in the neighbourhood.

"(2). A usufructuary mortgage shall be deemed to be a transfer within the meaning of this section.

\* \* \* \* \*

"(4). Every such tenant, and every tenant having the same rights under the corresponding provisions of Act XVIII of 1873, Act XII of 1881, or any other enactment for the time being in force, shall be called an ex-proprietary tenant, and, save as otherwise expressly provided, shall have all the rights and be subject to all the liabilities conferred and imposed upon occupancy tenants by this Act.

"(5). The land in which such occupancy right has been created shall be specified, and the rent payable therefor shall be fixed by the Collector under section 36 of the North-Western Provinces and Oudh Land Revenue Act, 1901."

In section 20 of Act II of 1901 it is enacted:—

"(2). The interest of an ex-proprietary tenant, an occupancy tenant, or a non-occupancy tenant other than a 'thekadar' is, subject to the provisions of this Act, heritable, but is not transferable in execution of a decree of a Civil or Revenue Court, or otherwise than by voluntary transfer between persons in favour of whom, as co-sharers in the tenancy, such right originally arose, or who have become by succession co-sharers therein."

In section 83 of Act II of 1901 it is, amongst other things, enacted:—

"(1). A tenant, not bound by a lease or other agreement for a fixed period, may, at the end of any agricultural year, surrender his holding; but he shall not be entitled to surrender a portion only of his holding.

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"(3). Nothing in this section shall affect any arrangement by which a tenant and his land-holder may agree to the surrender of the whole or any portion of a holding."

The Subordinate Judge apparently considered that clause (3) of section 83 had some bearing upon the facts of the case. Their Lordships cannot regard the agreement for relinquishment by the defendants in the sale deed of the 2nd May, 1903, and the execution by the defendants of the deed of relinquishment of the 5th May, 1903, as separate and distinct transactions. The execution of the deed of relinquishment on the 5th May, 1903, was merely a step taken towards giving effect to the agreement for relinquishment which was contained in the sale deed of the 2nd May, 1903, and was not an arrangement between a tenant and his landlord. The relation of landlord and tenant did not exist between the plaintiffs and the defendants at the time when the sale deed of the 2nd May, 1903, was executed.

It appears to their Lordships that it cannot be doubted that the policy of Act II of 1901 is to secure and preserve to a proprietor whose proprietary rights in a mahal or in any portion of it are transferred otherwise than by gift or by exchange between co-sharers in the mahal a right of occupancy in his "sir" lands, and in the land which he has cultivated continuously for twelve years at the date of the transfer, and that such right of occupancy is by the Act secured and preserved to the proprietor, who becomes by a transfer the ex-proprietor, whether he wishes it to be secured and preserved to him or not and notwithstanding any agreement to the contrary between him and the transferee. The policy of the Act is not to be defeated by any ingenious devices, arrangements, or agreements between a vendor and a vendee for the relinquishment by the vendor of his "sir" land or land which he has cultivated continuously for twelve years at the date of the transfer; for a reduction of purchase money on the vendor's failing or refusing to relinquish such lands; or for the vendor being liable to a suit for breach of contract on his failing or refusing to relinquish such lands. All such devices, arrangements and agreements are in contravention of the policy of the Act and are contrary to law and are illegal and void, and cannot be enforced by the vendee in any civil Court or in any Court of revenue.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

*T. L. Wilson & Co.* :—Solicitors for the Appellants.

*Truefitt & Francis* :—Solicitors for the Respondents.

J. M. P.

*Appeal dismissed.*



# CRIMINAL REVISION.

*Before Sir William Chitty, Knight, Judge, Mr. Justice Teunon and  
Mr. Justice Chaudhuri.*

AMRITA LALL BOSE AND OTHERS

v.

CORPORATION OF CALCUTTA.\*

*Calcutta Municipal Act (III B. C. of 1899). Secs. 559, 561—Bye-laws 83, 85  
—Joint offence—Punishment, joint or several.*

A, B and C were joint proprietors of a theatre. The theatre was kept open beyond the prescribed hour in contravention of bye-law 83 made under section 559 :

• *Held, (Chitty and Chaudhuri, JJ.)* that the maximum fine of Rs. 20 prescribed by Bye-law 85 made under section 561 must be jointly imposed upon all the proprietors and equally apportioned amongst them.

*Teunon J. Contra,* that the Court was competent to impose a fine of the maximum amount upon each of the proprietors.

Application for Revision by the accused.

Prosecution for breach of the Bye-law under the Calcutta Municipal Act, 1899.

The facts of the case and the arguments are fully stated in the judgments.

The Rule was originally heard by Teunon and Chaudhuri, JJ. who recorded the following dissentient opinions :

Teunon, J.—In this case the three petitioners are the co-sharer owners and managers of a theatre known as the Star Theatre situate in Cornwallis Street in the town of Calcutta.

On the night of the 3rd September, 1916, the performance at this theatre was continued beyond the hour of 1 A.M., the closing hour fixed by the bye-laws framed by the Corporation under section 559, sub-section 52 of the Calcutta Municipal Act, 1899. The petitioners have therefore been convicted of a breach of one of the aforesaid bye-laws, namely, the 83rd and under the 85th bye-law they have been sentenced, the first petitioner to pay a fine of Rs. 20 and the second and third petitioners each to pay a fine of Rs. 10.

It is not disputed, on the contrary it is admitted, that the petitioners acting in concert committed the breach complained of but on their behalf it is urged that under section 561 of the Act the breach of a bye-law is an offence single (or joint and indivisible)

\* Criminal Revision No. 1215 of 1916 against sentences, dated 24th November 1916, by Mr. N. N. Gupta, Municipal Magistrate, Calcutta.

[This case was subsequently overruled by a Full Bench—Rep.]

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in its nature, and that there can therefore be but one penalty, a fine not exceeding Rs. 20. In other words, it is contended that in so far as Bye-Law 85 says that every person guilty of a breach may be punished with fine which may extend to Rs. 20, it has gone beyond section 561 which provides that it is the breach of a bye-law that is or may be punishable with a fine of that amount, and to that extent, therefore, the bye-law is *ultra vires*.

In support of this contention the case of *Rex v. Olark et al*, (1), decided by Lord Mansfield in 1777 has been cited. In the course of the argument we have also been referred to the case of *Cripps v. Durdan* (2) which seems to have no bearing on the question now at issue, and also to the case of *R. v. Dean* (3) and *R. v. Littlechild* (4).

Now in each of these cases it is to be observed that the joint offenders were severally punished, and the observations of the learned Judges touching offences in which, however, many the persons concerned, only one penalty attaches, must be regarded as largely in the nature of *obiter dicta*.

Two earlier cases—*R. v. Bleasdale* (5) and *Hardyman v. Whitaker* (6), the latter cited in *R. v. Clark et al* (1), appear to have been decided on the special wording of the Statute, 5 Anne, C. 14, S. 4.

Whether the distinction drawn or attempted to be drawn in *R. v. Clark*, between offences single in their nature and offences several in their nature continues at the present time to be recognised in English Law may be said, I think, to be doubtful.

But whatever the law in England, no Indian authority in support of the contention advanced on behalf of the petitioners has been cited before us, and to my mind it is fairly clear that neither the distinction referred to nor collective penalties have been recognised in Indian penal legislation.

In support of this view, I should refer to the definition of the word "offence" in section 40 of the Indian Penal Code. The 2nd clause of that section makes the subsequent sections (109, 110, 112 and 114—117) regarding abetment applicable to things punishable under special or local laws :—Section 109 then provides that each conspirator shall be punished with the punishment provided for the offence committed in pursuance of the conspiracy.

I should next refer to the Bengal General Clauses Act, I of 1899,

(1) (1777) 2 Cowper 610.

(2) (1777) Smith's L. C. Vol. I. 651 ; 2 Cowper 640.

(3) (1842) 12 M. & W. 59.

(5) (1792) 4 T. R. 809.

(4) (1871) L. R. 6 Q. B. 295.

(6) (1749) 2 East 573.

which for instance, applies sections 64 and 67 of the Indian Penal Code to fines imposed under the bye-laws made under the Calcutta Municipal Act, III of 1899.

For these reasons and on general principles I hold that when in section 561 of the Calcutta Municipal Act it is said that a breach of a bye-law may be made punishable with fine which may extend to twenty rupees, what is provided is that the persons guilty of the breach and in the case of breaches jointly committed each offender may be punished to that extent.

A secondary argument was that by virtue of the definition of the word "person" to be found in the Bengal General Clauses Act, section 3, sub-section (32), the three petitioners being joint proprietors of the theatre in question are to be regarded as one person for the purpose of the bye-law. But the definition applies only when there is no repugnancy in the subject or context. In the view I take three offenders cannot be punished as one, and fines and imprisonment are not to be apportioned.

Lastly, I observe that my learned colleague has suggested that the facts have not been sufficiently investigated, but this is to go outside the scope of the rule and beyond any suggestion made or argument advanced either at the time when the application was presented or when the Rule came on for hearing. The petitioners having pleaded guilty, further investigation of the facts became unnecessary, and there has been no suggestion that the theatre was kept open otherwise than as the result of combination and agreement between all three.

For the foregoing reasons, I am of opinion that the bye-law in question is not *ultra vires* and the petitioners have been properly convicted and sentenced.

In this view the Rule should be discharged.

**Chaudhuri, J.**—This Rule was issued at the instance of the three petitioners calling upon the Municipal Magistrate and the Chairman of the Calcutta Corporation, to show cause why the fine imposed upon them should not be reduced to a sum not exceeding Rs. 20 in all. They are the proprietors of a theatre known as the "Star Theatre," and have been convicted and sentenced by the Municipal Magistrate under clauses 83 and 85 of the Bye-Laws framed under section 559 (52) of the Calcutta Municipal Act—Act III B. C. of 1899, for having on the 3rd September, 1916, continued the performance at the Theatre, later than 1 A.M. The petitioner Amrita Lal Bose has been fined Rs. 20 and Hari Prosad Bose and

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Dasu Charan Neogy, the other two petitioners, Rs. 10 each. The question before us is whether separate fines exceeding Rs. 20 in all can be imposed. The Magistrate in his explanation says, that it has not been shown that the Star Theatre is a limited liability company, that the petitioners may be partners, but do not constitute a "person" in the eye of the law. He does not think that the definition of "person" in the General Clauses Act X of 1897 is strictly applicable to the Calcutta Municipal Act and the bye-laws thereunder. He has however overlooked that the Bengal General Clauses Act—Act I of 1899 applies, section 3, sub-section (32) of which defines "person" thus: "Person shall include any company or association or body of individuals, whether incorporated or not." If the petitioners constitute a partnership, incorporated or not, it comes within the definition. Bye-law 85 runs as follows:—"Every person guilty of a breach of any of these bye-laws (referring to the Bye-laws relating to Theatres) shall be punishable with fine which may extend to Rs. 20." I do not think that the three petitioners can be separately punished with fine exceeding Rs. 20 in all for a breach of Bye-law 83 which prohibits performance later than 1 A.M. Section 559 of Act III of 1899, sub-section (52) empowers the General Committee of the Municipality to make bye-laws for the regulation of Theatres. Section 561 provides that in making a bye-law under section 559 the General Committee may provide that a breach of it shall be punishable with fine which may extend to Rs. 20. The penalty is therefore limited to Rs. 20 only. No doubt bye-law 85 says "every person guilty of a breach shall be punishable." The statute makes *the breach punishable*. I do not think that the limit which has been imposed by the Statute can be exceeded by any bye-law. The Magistrate explains that bye-law 85 says "every person shall be punishable and not every offence is to be punished." He has referred to the case of *Regina v. Dean* (1), and says that he has followed that ruling in awarding the above punishment. It is to be noticed that the case referred to, was one under section 44 of the Smuggling Prevention Act 3 and 4 Will. 4 C. 53 which clearly makes different persons liable. Baron Alderson points out that it is necessary to look at the Statute to see whether it was intended that every person offending should be punished. Here clearly the Statute provides that the breach shall be punishable and the bye-law thereunder, must be interpreted in that light. No bye-law can extend the meaning or effect of the parent Statute. Here the penalty under the Statute refers to the offence. Crimes undoubtedly are

several, but an offence of this character can hardly be said to be several. The "person" who is guilty of the offence are the proprietors of the Theatre, not the partners individually. If each partner were held liable for the breach, the larger the number of proprietors the greater would be the penalty. I do not think it was ever intended that the fine was to be imposed in this way, a limit having been placed as to the amount by the Statute itself. In *Rex v. Clarke* (1), Lord Mansfield enunciates the principle thus: "Where the offence is in its nature single and cannot be severed, there the penalty shall be only single; because, though several persons may join in committing it, it still continues but one offence." *Rex v. Clarke* (1) was treated as good law in *The Queen v. Littlechild* (2), in which Hannen, J., quoted with approval the following rule from Paley on Convictions, 5th Edition, page 262 (6th Edition, page 275). "If either the penalty be imposed by the Act upon each person convicted, even where the offence would in its own nature be single, or if the quality of the offence be such that the guilt of one person may be distinct from that of the others, in either of these cases the penalties are several." Here the Act has not imposed several penalties, and it does not seem to me that keeping the Theatre open is such an offence that the guilt of one proprietor can be considered distinct from the guilt of the others. They collectively are a "person". *Creeps v. Durdin, et alios* (3), was cited at the Bar to show that such an offence is not divisible in point of time. It relates to Sunday sales which are prohibited by 29 Car. 2 C. 7, and it was held that different sales by the same person on a Sunday are not punishable as separate offences but as one offence. A breach of bye-law 85 is under the Bengal General Clauses Act—Act I of 1899—section 3, sub-section (30) an "offence" which is defined as "any act or omission made punishable by any law for the time being in force". The punishment for the offence is provided in the Municipal Act, and also in the bye-law thereunder. Section 26 of the Bengal General Clauses Act provides that sections 63 to 70 of the Indian Penal Code and the provisions of the Criminal Procedure Code, relating to the issue of processes for the levy of fines, apply to all fines imposed under any Bengal Act or any rule or bye-law thereunder, unless the latter contains an express provision to the contrary. Beyond that we need not go to the Penal Code. In this case we need not consider the question as to whether "abettors" as defined in the Penal Code can be held liable. The

(1) (1777) 2 Cowper 610.

(2) (1871) L. R. 6 Q. B. 293.

(3) (1777) 1 Smith L. C. (11th Edition) 657; 2 Cowper 640.

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Magistrate says that the petitioners are "also Managers in three different capacities of the Theatre in question". There is nothing to show what part each took in the management of the Theatre. It is not shown what each of them did in respect of the performance on the 3rd September. They have been separately fined, merely as proprietors. No individual default has been proved or attempted to be proved against them. They apparently admitted they were proprietors and pleaded guilty, that the Theatre was kept open after 1 P.M. Beyond that nothing has been proved against them. I am not prepared to give the bye-law an extended application and hold that individual members of the audience who were present on that occasion, the actors, the orchestra and the menial staff of the Theatre, all who aided the performance, are liable to a fine of Rs. 20 each, under bye-law 85. Take for instance bye-law 84 which says that the Manager shall not allow any person in a state of intoxication to enter a Theatre. Bye-law 85 equally applies to its breach, but by the introduction of the abetment sections in the Penal Code, various other persons may be held liable. It seems to me fairly clear that it was not so intended, but as I have said it is unnecessary to deal with that question in this case. In the case of penalties we cannot adopt an oppressive interpretation. Several bye-laws have been framed under the Municipal Act for the regulation of Theatres and section 85 collectively deals with penalties for their breach. The language used in it does seem to me to be happy.

The Magistrate has referred to some earlier cases in which separate fines were imposed upon the petitioners, to which apparently they did not object. I notice that in all those cases the aggregate amount of fine imposed did not in any instance exceed Rs. 20. Those cases have no value at all, in considering the question before us.

In view of what I have said, I would make the Rule absolute, and direct that the fine in excess of Rs. 20, if paid, to be refunded.

The case was therefore referred to Mr. Justice Chitty.

*Messrs. Eardley Norton and K. N. Chaudhuri and Babu Hemendra Nath Sen* for the Petitioners.

*Mr. Langford James and Babu Manmatha Nath Mukherji* for the Opposite Party.

The following judgment was delivered by .

Chitty, J.—In this case a Rule was issued at the instance of the three petitioners Amrita Lal Bose, Hari Prosad Bose and Dasu

*February, 19.*

Charan Neogy, calling on the Municipal Magistrate and the Chairman of the Corporation to show cause why the sentences imposed on the three petitioners should not be modified and reduced to a sum not exceeding Rs. 20 in all. The grounds were (1) that bye-law (85) does not empower the Magistrate to impose a fine of more than Rs. 20 for a breach thereof, and (2) that the petitioners being joint partners and owners of the Star Theatre were a "person" within the meaning of bye-law (85) and thus not liable to be fined separately or more than Rs. 20 in all. The learned Judges who heard the Rule having differed in opinion, the case has been laid before me for my opinion under section 429, Criminal Procedure Code. The three petitioners are the joint proprietors of the Star Theatre in Cornwallis Street. On the night of 3rd September 1916, the performance at that Theatre was continued beyond 1 A. M. The three petitioners were summoned for having committed a breach of bye-law (83) and the second petitioner appeared and admitted the offence. The Municipal Magistrate thereupon fined the three petitioners Rs. 20, Rs. 10 and Rs. 10, respectively. The only question is whether the imposition of such penalties was authorised by law.

Section 559 of the Calcutta Municipal Act, 1899, provides that the General Committee may make bye-laws (*inter alia*) (52) for the regulation of theatres and other places of public resort, recreation or amusement.

By section 561, in making a bye-law under section 559, the General Committee may provide that a breach of it shall be punishable (a) with fine which may extend to twenty rupees, and, in case of a continuing breach with fine which may extend to ten rupees for every day during which, the breach continues after conviction for the first breach.

By bye-laws made under section 559 for the regulation of theatres, etc., it was provided (*inter alia*) (83) no performance shall be continued later than 1 A. M. unless with the special permission of the Chairman for any particular occasion, and, (85) every person guilty of a breach of any of these bye-laws shall be punishable (a) with a fine which may extend to twenty rupees, etc. (following the words of section 561 above quoted).

In Paley on Summary Convictions, 6th Edition at page 275, the law is thus stated "Though several offenders may be (as it seems) included in one conviction for offences jointly committed it depends upon the wording of the particular statutes applicable to each case, and the quality of the offence, whether each person be liable to a distinct penalty or all collectively to but one." The determination

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of the question therefore depends upon the interpretation to be put upon the particular statute, in this case the Calcutta Municipal Act, 1899. In *Rex v. Clark* (1) Lord Mansfield thus enunciated the proposition "where the offence is in its nature single and cannot be severed, there the penalty shall be only single; because, though several persons may join in committing it, it still constitutes but one offence; but where the offence in its nature several, and where every person concerned may be separately guilty of it, there each offender is separately liable to the penalty; because the crime of each is distinct from the offence of the others and each is punishable for his own crime." I am unable to agree that because in that case the offence was found to be in its nature several, this is a mere *obiter dictum*. It lays down in clear and unmistakable terms the test to be applied. So, too, the remarks of Alderson B. (in *Regina v. Dean* (2)) "We must look at the statute to see whether it was intended that every person offending should be punished, or merely that every offence should be punished. The question is, whether an offence which is committed by several persons is to be visited by one penalty or each person is to be visited by a penalty." In the case before me I am clearly of opinion that the offence is single in its nature and that the Calcutta Municipal Act provides a punishment for the offence, and not for the individual offenders. The words "a breach of (a bye-law) shall be punishable" can only mean that. Nor can it have been intended that the penalty to be imposed, *i.e.*, Rs. 20 or Rs. 10 per diem, for a continuing breach, should be indefinitely multiplied in proportion to the number of persons jointly committing such breach.

If it be argued that such an intention is indicated by the use of the words "every person" in bye-law (85), and if that was the only possible interpretation to be put upon them, I should be inclined to hold that the bye-law was to that extent *ultra vires*. But I do not so read it. The word "person" by the definition in the Bengal Clauses Act, 1899, includes "any company, or association, or body of individuals, whether incorporated or not." It would therefore include the three petitioners as joint proprietors of this theatre and they may properly be regarded as a "person" for the purposes of bye-law (85).

In my opinion the provisions of the Indian Penal Code have no direct bearing on the present question, which is one of the interpretation of the particular statute. No doubt some of the provisions of that Code are made applicable by the Bengal General Clauses

(1) (1777) 2 Cowper 610.

(2) (1843) 12 M. &amp; W. 39.



Act, 1899, and in other ways to offences under special and local laws, such as the present. But we are not now concerned with, say, the question of abetment of the breach of a bye-law; and I am not prepared to say that a person might not be charged with such an abetment. The question of intention would then crop up, which finds no place in cases of the breach of many of the bye-laws.

So far as section 64 of the Indian Penal Code is concerned it has been pointed out that it could not be enforced in a case of such a breach of a bye-law as that which we are now considering (see *Basanta Kumari Debi v. The Corporation of Calcutta* (1).

So far as I am aware, the principles laid down in the various English cases for the interpretation of the statutes, to ascertain whether the offence be single or several in its nature, have not been changed in recent years. In the case of *Regina v. Showdar Ghenar* (2), the question came before a Full Bench of the Bombay High Court. There Westropp, C. J., in an exhaustive judgment reviewed all the English cases, and the Court applying the same test to the statute then before them (Reg. XXI of 1827, section 4) held that the several accused could only be liable for the one penalty. This case, which does not appear to have been cited to the Bench who heard the Rule, shows that in Bombay, at least, the old English decisions were accepted as sound law in 1870.

I agree therefore with Chaudhuri, J., in holding that the Rule must be made absolute. The conviction of the three petitioners will be upheld but the penalty imposed upon them will be one of Rs. 20 only, to be apportioned equally between them. Any excess over Rs. 20, if paid, to be refunded.

S. C. R. C.

*Rule made absolute.*

(1) (1911) 15 C. W. N. 906.

(2) (1870) 7 B. H. C. R. Cr. C. 39.

*Before Mr. Justice Teunon and Mr. Justice Richardson.*

BAIDYA NATH BOSE

*v.*

KING-EMPEROR.\*

*Indian Motor Vehicles Act (VIII of 1914), Sec. 11, Rules under—Part II, Rules 3, 19, contravention of—Owner's Liability for the acts and conduct of his servant.*

\* Criminal Revision No. 320 of 1917, against the order of Mr. K. B. Das Gupta, Fourth Presidency Magistrate of Calcutta, dated the 15th January, 1917.

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Where an owner has permitted or authorised the use of his motor vehicle, he is under Part II, rules 3 and 19 of the rules framed by the Governor-in-Council under section 11 of the Indian Motor Vehicles Act, liable for any contravention of the Rules committed by his licensee or servant during the period of such user.

*Thornton v. Emperor* (1) followed.

Criminal Revision.

The petitioner prayed that the order of the Fourth Presidency Magistrate of Calcutta convicting him under rules 3 and 19 (Part II) of the Indian Motor Vehicles Act and sentencing him to pay a fine of Rs. 10 or in default to suffer simple imprisonment for 10 days might be set aside.

The other material facts will appear sufficiently from the judgment.

*Babu Santimoy Majumdar* for the Petitioner.

*Mr. Camell* for the Crown.

C. A. V.

The judgment of the Court was as follows :—

April, 30.

In this case the petitioner has been convicted under Part II, rule 3 read with rule 19 of the rules framed by the Governor-in-Council under section 11 of the Indian Motor Vehicles Act, VIII of 1914 for the purpose of regulating the use of motor vehicles in Calcutta.

The petitioner is the owner of Taxi cab No. B. E. 1, and it has been found that on the night of the 14th September last the licensed driver placed by the petitioner in charge of his car drove so negligently as to overturn the car into a road-side drain and cause injury to the passengers.

It is not disputed that the driver has thereby contravened rule 19, and the question is whether, by virtue of rule 3, the owner against whom, on the disappearance of the driver, proceedings have been taken, is liable for the acts and conduct of his servant.

Rule 3, in so far as applicable to the present case runs as follows :—

"No person shall . . . . . permit to be used any motor vehicle . . . . . which is so driven or used as to contravene any of these rules."

The contention of the petitioner is that this rule makes an owner liable only when he abets the driver in the commission of his offence.

On the other hand, the Crown contends that the effect of the rule is that when, as in this case, an owner has permitted or authorised the use of his car, he is liable for any contravention of the rules committed by his licensee or servant during the period of such user.

The language of the rule cannot be said to be very happy, and speaking for myself I think the construction is not free from doubt.

(1) (1911) I. L. R. 38 Calc. 415.

But it appears that the question is concluded by authority. In the case of *Thornton v. Emperor* (1) a Bench of this Court placed upon a rule, couched in identical terms, the construction for which the Crown now contends.

No doubt that rule was framed under the provisions of Bengal Act VII of 1903 which has since been repealed and replaced by Act VIII of 1914, but there is nothing in the amending Act to suggest that the Court should now place a different construction upon the rule in question.

On the authority of the case cited this Rule is discharged.

A. N. R. C.

*Rule discharged.*

(1) (1911) I. L. R. 38 Calc. 415.

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*Before Mr. Justice Tennon and Mr. Justice Smither.*

PRAFULLA NATH TAGORE AND OTHERS

v.

J. HODDING AND OTHERS.\*

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1917.  
April, 25.

*Criminal Procedure Code (Act V of 1898), Secs. 145, 146—Jurisdiction—Rejection of evidence on erroneous grounds—Gross and material irregularity—Order, if liable to be set aside on that ground—Bengal Survey Act (V of 1875), Secs. 40, 41, decision under, effect of—Record-of-rights—Presumption as to possession.*

An order under section 146 of the Code of Criminal Procedure was set aside on the ground that although there was no lack of jurisdiction at the time of the initiation of the proceedings under section 145 of the Code, the Magistrate made his final order either without jurisdiction or after such gross and material irregularities as seriously to prejudice one of the parties, by discarding and rejecting on erroneous grounds practically every piece of evidence that might have led him to a correct conclusion as to possession.

Where a dispute between the parties had been terminated by an order under the provisions of sections 40 and 41 of the Bengal Survey Act, and there had also been an entry in the Record-of-rights in accordance with that order, the Magistrate should in determining the question of possession between the parties in a subsequent proceeding under section 145 of the Code of Criminal Procedure, presume that the possession of the land was with the owner who had title as

\* Criminal Revision No. 282 of 1917, against the order of Moulvi S. Abdul Latif, Sub-divisional Magistrate of Patuakahali, dated the 3rd December, 1916.

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determined by the decision under the Survey Act, and which title was further to be presumed from the entry in the record-of-rights.

### Criminal Revision.

Application by the 2nd party to a proceeding under section 145 of the Code of Criminal Procedure, praying that the order of the Magistrate directing under section 146 of the Code the attachment of the disputed lands till the question of possession was decided by a competent Court might be set aside.

*Babus Dasarathi Sanyal* and *Hira Lal Chakravarti* for the Petitioners.

*Babu Surendra Nath Guha* for the Opposite Party.

The judgment of the Court was delivered by

April, 25.

**Teunon, J.**—This Rule is directed against an order made by the Sub-Divisional Magistrate of Patuakhali under the provisions of section 146 of the Code of Criminal Procedure by which he has attached a certain plot of land which is described as a partially excavated tank. The dispute which gave rise to the proceedings under section 145, Criminal Procedure Code, was one between the owners of a mouzah called Algi towards the west and the owners of the neighbouring mouzah called Chandkati on the east. Between these two mouzahs there runs a *khal* now in a great measure silted up. In the map prepared in the course of the record-of-rights in connection with these two mouzahs that *khal* has been marked as plot 107. Of the partially excavated tank, part of it appears falls in plot marked 63, which it is not disputed is within the boundary of mouzah Algi, and another large portion is within the *khal* marked No. 107. Whether the tank does or does not extend also to some small extent on to three plots of mouzah Chandkati, Nos. 1, 6 and 9 is a matter which has not been definitely determined.

We then find that in 1902 between the proprietors of these two mouzahs there was regarding the *khal* a dispute which was terminated by an order under the provisions of sections 40 and 41 of the Bengal Survey Act V of 1875. The order which was made by the Collector was in favour of the owners of mouzah Algi, and it is not disputed that that order has the force of an order of the civil Court. In addition to that we have also the entry in the record-of-rights which is in accordance with that order and is also in favour of the owners of Algi.

It is then practically conceded that up to the time when the work of excavation of this tank began the site of the tank was lying

fallow at least in so far as that site falls within the *Mhal* and the boundaries of mouzah Algi. That being so, it seems to us clear that when the Magistrate proceeded to determine the question of possession which arose between the parties he should in the first instance have presumed that the possession of this fallow land was with the owners who had title as determined by the decision under section 41 of the Survey Act and which title was further to be presumed from the entry in the record-of-rights. If he had started his investigation upon that basis, he would then have next determined or proceeded to determine the exact position of this boundary line; and as a matter of fact in order to determine the boundary line he deputed a survey officer for the purpose. That officer, a Kanungo, prepared a map in which he had shown the boundary line as ascertained by him on a comparison of the maps prepared in the course of the record-of-rights, that is to say, the map of mouzah Algi and the map of mouzah Chandkati.

Instead of proceeding in the way we have indicated the Deputy Magistrate has first of all discarded *in toto* the decision arrived at under the provisions of the Survey Act, and for that he gives the following reason:—He says that it is not clear that the dispute in that decision was between the mouzah Algi on the one side and mouzah Chandkati on the other, and suggests that it was between Algi and another mouzah of the name of Jamalkati. This reason or argument he founds on what appears to be an endorsement by a ministerial officer in the Collector's order made in 1902. That endorsement appears to have been made with a view to an entry in some register; and apart from the fact that Jamalkati appears to be a clerical error for Chandkati, for of the existence of any mouzah of the name of Jamalkati there is no trace, the endorsement has no evidentiary value, and is indeed inadmissible in evidence.

In the next place he says that the Sudder Kanungoe in preparing his map has neglected to relay the revenue survey line, but here again he overlooks that the revenue survey line is of no importance in this case, because long after the revenue survey had taken place the boundary line between the two mouzahs was definitely decided and determined in the proceeding in 1902. He then discards entirely the results of the investigation made by the Sudder Kanungoe and the map prepared by him on the ground that the District Settlement map of Algi and the District Settlement map of Chandkati do not agree in all particulars. But that sort of discrepancy very frequently occurs in cases of survey of adjoining

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villages; and he has altogether overlooked the fact that the line ascertained by the Kanungoe is not one taken from either the map of Algi or the map of Chandkati but is the result of the Kanungoe's reconciliation of the two.

An order under section 146 of the Code of Criminal Procedure can be made only when the Magistrate is unable to satisfy himself as to which of the contending parties is in possession. In this case for the reason that we have given above we can only say that the Sub-Divisional Magistrate has not applied his mind to the essential questions and has made no effort whatsoever to ascertain possession. He has discarded and rejected on erroneous grounds practically every piece of evidence that might have led him to a correct conclusion. We do not say that in the first instance when he initiated the proceedings under section 145 there was any lack of jurisdiction. It does not appear that there was any such lack of jurisdiction, inasmuch as it seems that there was a dispute. But having initiated the proceedings under section 145 he has made his final order either without jurisdiction or after such gross and material irregularities as seriously to prejudice the second party.

For these reasons we set aside his order and direct that the proceedings be resumed at the point reached when the two parties closed their evidence, it being now open to them to adduce such further evidence as either of them may be advised.

A. N. R.C.

*Rule made absolute.*

## CIVIL RULE.

*Before Mr. Justice Teunon and Mr. Justice Chaudhuri.*

SURENDRA NATH BISWAS

v.

SHYAMA CHARAN MANDAL.\*

CIVIL.

1916.

April, 17, 18.

*Civil Procedure Code (Act V of 1908), Secs. 47, 63—Property, attachment of, in execution of decrees of different Courts—Execution proceeding, dismissal of—Order, if appealable.*

\* Civil Rule No. 933 of 1915, against the order of A. H. Cuming Esq., District Judge of 24-Pergunnahs, dated the 24th July, 1915, modifying the order of Babu Amulya Nath Ghose, Subordinate Judge, 2nd Court, at Alipore, dated the 21st June, 1915.

A property belonging to a judgment-debtor was attached at the instance of two judgment-creditors by the District Judge as also by the Subordinate Judge. The Subordinate Judge, having regard to the provisions of section 63 of the Code of Civil Procedure, then declined to proceed with the application of the judgment-creditor for sale of the property, and being of opinion that such proceedings should be taken in the Court of the District Judge, dismissed the execution case pending on his file :

*Held*, that the order passed by the Subordinate Judge was one relating to execution within the meaning of section 47 of the Code of Civil Procedure, and as such was appealable.

*Rama Prosad Roy Chowdhury v. Anukul Chandra Roy Chowdhury* (1) referred to.

Application for execution.

The material facts will appear sufficiently from the judgment.

*Sir S. P. Sinha* (*Advocate-General*) and *Babu Satyendra Nath Mitra* for the Petitioners.

*Babus Mahendra Nath Ray* and *Asiranjana Chatterjee* for the Opposite Party.

The judgment of the Court was as follows :

In this case it appears that at the instance of two different judgment-creditors one and the same property was under attachment in the Court of the District Judge of Alipore and also in the Court of the Subordinate Judge of that station. An application was made in the Court of the Subordinate Judge praying that proceedings should be taken for the sale of the property in that Court. Having regard to the provisions of section 63 of the Code of Civil Procedure the Subordinate Judge declined to proceed with the application in his Court. He was of opinion that such proceedings should be taken in the Court of the District Judge and being of this opinion he further dismissed the execution case then pending on his file. Against his order an appeal was preferred to the District Judge. The District Judge agreed with the Subordinate Judge in holding that the proceeding for the sale of the property should be taken in his Court. But having regard to possible difficulties that might attend the removal of the execution case from the file of the Subordinate Judge he modified that part of the Subordinate Judge's order and directed that the execution case should remain pending in the Court of the Subordinate Judge until such time as the execution proceedings in the District Judge's Court had come to an end.

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In reliance mainly on the case of *Rama Prosad Roy Chowdhury v. Anukul Chandra Roy Chowdhury* (1), it is contended before us that against the order of the Subordinate Judge no appeal lay to the District Judge. We are of opinion that this contention is not well-founded. In so far as the order of the Subordinate Judge is one declining to proceed with the execution and in so far as it might possibly have the effect, as has been suggested of removing the attachment resting on the property in that Court the order to our mind is clearly one relating to execution within the meaning of section 47 of the Code of Civil Procedure and appealable. As to the propriety of the Judge's order there is in fact no substantial contest before us, and we think that in so far as it directs that the execution case that was pending on the file of the Subordinate Judge should remain pending on that file instead of being treated as disposed of, and dismissed. We are of opinion that his order is correct and if as against that portion of the Subordinate Judge's order no appeal lay, we accept the order in that respect of the District Judge as our own order and affirm it.

The Rule is discharged with costs three gold mohurs.

A. N. R. C.

*Rule discharged.*

(1) (1914) 20 C. L. J. 512.

## APPEAL FROM ORIGINAL CIVIL.

*Before Sir Lancelot Sanderson, Knight, Chief Justice, and Sir Asutosh Mookerjee, Knight, Judge.*

CIVIL.

1917.

January, 9.

KETOKEY CHARAN BANERJEE AND OTHERS

v.

SRIMATI SARAT KUMARI DEBI.\*

*Costs—Adjudication order, setting aside of—Benamider's liability to pay costs—Abuse of process of Court—Application before different Bench—Party made liable, residing outside jurisdiction—Jurisdiction.*

A, B, C, D and E were members of a certain firm. On the application of F, wife of S—A, B, C and D were adjudicated insolvents. The order of adjudication was made on the basis that certain shares in the business had been

\* In the matter of Appeal from Original Side No: 87 of 1914.



assigned to H. S and E were joint in business. It was found that assignment to H was an assignment to him as a *benamidar* for E and S. It was also found that F was not a real creditor of the firm at all but that she was put forward merely as a blind for E and S.

An appeal was preferred by persons who were adjudicated insolvents at the instance of F. An application for the cancellation of the adjudication was made on the ground that there was no debt due to F and this application was dismissed by the Judge sitting on the original side. An appeal was preferred and was heard by a Bench consisting of three Judges. The appeal was allowed. Subsequently an application was made by the petitioner (the appellant in the appeal) before a Bench differently constituted, praying for an order that the real people behind F should be made to pay the costs of the proceeding connected with the claim of F as a creditor in the insolvency :

*Held*, that the Bench so constituted had jurisdiction to deal with the matter.

That the Court had jurisdiction to make an order with regard to the costs of the insolvency proceedings, when it was satisfied upon the facts of the case that the proceedings were an abuse of the process of the Court.

*Jointee v. Annando* (1) referred to.

That E and S should pay the costs of the insolvency proceeding, inasmuch as there were no means of getting them paid by F, she having no property.

That though E lived outside the jurisdiction of the original side of the High Court and did not carry on business within that jurisdiction, the Court had jurisdiction to make an order with regard to the costs of the insolvency proceedings, as it was found that he was in reality one of two persons who came to Court for the purpose of making use of the process of the Court.

Application praying for an order that certain persons be made to pay the costs of the insolvency proceedings.

The material facts are set forth above.

*Mr. N. Sirkar* for the Petitioner.

*Mr. H. D. Bose* for the Opposite Party.

Sanderson, C. J.—In this case there was a firm consisting of certain persons Ketokey Charan Banerjee, Apurna Chunder Banerjee, Keshini Charan Banerjee, Gyanada Charan Banerjee, and Nogendra Nath Banerjee who, as I understand it has been found, had certain interest in the firm. The business was carried on under the style of A. C. Chatterjee & Co. The first four of the above-mentioned persons were adjudicated insolvents upon the application of one Sarat Kumari Debī who is the wife of one Surendra Nath Banerjee and it has been found that Surendra Nath Banerjee and Nogendra Nath Banerjee were joint in business. The basis of the application for the adjudication in insolvency was that certain shares

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(1) (1865) 14 W. R. A. O. J. 1 (4).

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in the business had been assigned to an individual whose name was Dinanath Mukerjee, and the orders of adjudication was made upon that allegation. After two or three investigations, it was found that the assignment to Dinanath was an assignment to him as a *benamdar* for Nogendra Nath Banerjee and Surendra Nath Banerjee. It has also been found by this Court that Sarat Kumari Debi was not a real creditor of the firm at all but that she was put forward merely as a blind for Nogendra Nath Banerjee and Surendra Nath Banerjee, so that the real position was this that Nogendra Nath Banerjee and Surendra Nath Banerjee were in reality presenting the petition for the adjudication in insolvency based upon an assignment which was apparently made to a third person but was in reality made to themselves, and then having got that adjudication they were putting forward Sarat Kumari as a creditor whereas they were themselves in reality making a claim as creditors in the adjudication. It should further be added that upon the application of the petitioners Greaves J. by an order, dated 4th August 1916, annulled the adjudication order. The Court of appeal having held (1) that the application of Sarat Kumari Debi was not the application of a *bona fide* creditor of the firm, and her claim having consequently been dismissed with costs, the petitioner now comes before the Court asking for an order that the real people behind Sarat Kumari Debi should be made to pay the costs of the proceedings connected with the claim of Sarat Kumari Debi as a creditor in the insolvency and this application is based upon the allegation that the proceedings by Nogendra Nath Banerjee and Surendra Nath Banerjee, in the name of Sarat Kumari Debi were an abuse of the process of the Court.

The first point taken by the learned counsel who showed cause against this Rule was that this Court had no jurisdiction to make the order. The section of the Civil Procedure Code to which our attention was drawn was section 151 which provides as follows, "Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court." As regards the inherent power of the Court to deal with an abuse of the process of the Court there is authority to be found in the case of *Jointee Chunder Sein v. Anando Lall Doss* (2). I need not refer to the facts of that case, but it is an authority for saying that this Court has ample power to make an order with

(1) (1916) *Ketokey v. Sarat*, 20 C. W. N. 995.

(2) (1865) 14 W. R. A. O. J. 1 (4).

regard to the costs of the proceedings, where it is satisfied upon the facts of the case that the proceedings have been an abuse of the process of the Court; and, in my judgment there is no doubt that on the facts of this case we have jurisdiction to make the order asked for if we think it proper so to do.

The next point raised is that inasmuch as Nogendra Nath Banerjee lived outside the jurisdiction of the original side of this Court and he did not carry on business within the limits of the original jurisdiction of this Court, we could not now make any order as against him, it being admitted that Surendra Nath Banerjee was within the jurisdiction of this Court. As regards Nogendra Nath Banerjee, in my judgment the position is this: This Court has held that in reality he was one of the two persons who came to the Court for the purpose of making use of the process of the Court, and if we come to the conclusion on the facts of the case that not only did he make use of the process of the Court but also that he abused the process of the Court, I have no doubt that this Court has jurisdiction to make an order not only in his case but also in the case of Surendra Nath Banerjee.

The third point that was raised by the learned counsel, Mr. Bose, was that on the facts of the case no order as to costs ought to be made. In my judgment this Rule should be made absolute. I think that I have already stated the facts sufficiently to show that from the beginning to the end, the proceedings instituted by Nogendra Nath Banerjee and Surendra Nath Banerjee were an abuse of the process of the Court. In the first instance, as I have already said, they put forward an assignment which purported to be made to a third person as a basis of the insolvency proceedings, whereas it has been found as a fact that the assignment was in reality made to these two. They then put forward the lady Sarat Kumari Debi who was the wife of Surendra Nath Banerjee, as a *bona fide* creditor whereas it has been found as a fact that she was not a *bona fide* creditor; and, for the purpose of my judgment and to make the statement of facts quite clear I propose to read what was said by my learned brother Mr. Justice Mookerjee on the hearing of the appeal, as follows: "The essence of the matter is that her account opens with two sums, Rs. 2,487-8-6 p. and Rs. 14,233-13-6 p. respectively; in respect of one of these sums, the lady was a *benamdar* of her husband, while in respect of the other, she was a *benamdar* of her brother-in-law. True it is that there is no evidence of the source of the subsequent advances, but in the absence of tangible proof, we cannot assume that those sums belonged rather

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to her husband than to her brother-in-law. There is, further, a significant admission by Nagendra Nath Banerjee that he and his brother Surendra Nath Banerjee are joint, and this account may lend some support to a possible theory that both the brothers used the name of the respondent as their *benamdar*. But whatever the real state of affairs may be, one cardinal fact is established beyond controversy, namely, that the respondent is not a creditor of the insolvents. How much of the sum which stands in her name is her husband's money and how much thereof is her brother-in-law's money, we do not know; but if she be not a creditor of the insolvents, as I hold she is not, the conclusion is irresistible that her name must be removed from the category of the creditors of the insolvents in these proceedings" (1). I ought to have said that Sarat Kumari Debi is a *pardanashin* lady with, as I understand, no property of her own.

Now, under those circumstances I think in such proceedings as these, when they have failed in consequence of the decision of this Court, and when, if the costs are taxed, there are no means of getting them paid by Sarat Kumari Debi she having no property, and when we find that the real people behind her were first of all her husband, and secondly, her brother-in-law, who have used her name in connection with these proceedings, it would be most unjust if we were prevented from making a proper order as to costs. In my judgment there has been an *abuse* of the process of the Court. Consequently, the costs which have been taxed with respect to this matter, which I understand, amount to Rs. 187½ should be recovered from Nogendra Nath Banerjee and Surendra Nath Banerjee.

There is one final point taken by the learned counsel and that was that his client was not present when the taxation of the costs took place. It is however, admitted that notice was given to Sarat Kumari Debi of the fact that the taxation of the costs was going to take place, and if either of his clients had desired, (she being the wife of one and the sister-in-law of the other, and the facts must have been known to them) to dispute any item of the taxation, they should have appeared through their attorney to investigate the costs. I do not think in this case any further taxation of costs ought to take place.

My learned brother Mr. Justice Mookerjee reminds me that there was one other point to which I have not referred, and that was this: It was contended by Mr. Bose that inasmuch as the appeal was heard by a Bench constituted by myself, Mr. Justice Woodroffe

(1) *Ketokey v. Sarat* (1916) 20 C. W. N. 995 (999).

and Mr. Justice Mookerjee, this matter could not be disposed of by the Bench constituted as at present by my learned brother Mr. Justice Mookerjee and myself. There is nothing in that contention for this reason: This is not a question of a review of the judgment which was passed by us sitting together with Mr. Justice Woodroffe. This is a substantive application made to us today, and in my judgment there cannot be any doubt that the Bench as at present constituted has full jurisdiction to deal with this matter. It would probably have been more convenient if the application could have been made to the Bench when Mr. Justice Woodroffe was sitting with us, and we would have been glad to have had his assistance, but I have no doubt that the Bench as at present constituted has full jurisdiction to deal with the matter.

The Rule is made absolute with costs.

Mookerjee, J.—I agree.

Mr. K. N. Ganguly :—Solicitor for the Insolvents.

Mr. H. N. Dutt :—Solicitor for the Creditor.

A. T. M.

Rule made absolute.

## FULL BENCH.

*Before Sir Lancelot Sanderson, Knight, Chief Justice, Sir John Woodroffe, Knight, Judge, Sir Asutosh Mookerjee, Knight, Judge, Sir Charles Chitty, Knight, Judge and Mr. Justice Teunon.*

ABDUL KARIM ABU AHMED KHAN GHAZNAVI

v.

THE ALLAHABAD BANK, LTD. \*

*Civil Procedure Code (Act V of 1908), O. 41, R. 23—Remand—Appellate Court—Inherent power.*

A Court of appeal has inherent power to order a remand and a retrial, if justice so requires it, in cases other than those mentioned in Order 41, rule 23 of the Code of Civil Procedure.

Appeal by the Defendant.

Suit for recovery of money against surety.

\* Full Bench Reference in application for review of judgment in Appeal from Original Decree No. 27 of 1916, against the decision of Mr. Justice Fletcher, dated 1st February, 1916, sitting on the Original Side.

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The suit of the Allahabad Bank against A. K. Ghaznavi was heard by Mr. Justice Fletcher and was decreed on the merits.

On appeal Sanderson, C. J. and Mookerjee, J. reversed the judgment of Mr. Justice Fletcher and directed a retrial of the suit before another judge in the original side. The Bank thereupon applied for review of judgment on the ground amongst others that as the suit had not been disposed of on a preliminary point within the meaning of order 41 rule 23 of the Civil Procedure Code the Court of appeal had no jurisdiction to direct a remand and a retrial of the whole suit. On this application for Review a Rule was granted. At the hearing of the Rule Mr. Buckland on behalf of the Bank contended that there was a conflict of judicial opinion upon the question whether or not a Court of appeal was competent to direct a remand and retrial in a case not comprised within the scope of order 41 rule 23 of the Civil Procedure Code. The Court (Sanderson, C. J. and Mookerjee, J.) thereupon referred the question of law for decision by a Full Bench.

#### ORDER OF REFERENCE.

In view of the conflicting decisions of this Court (in the cases of *Zohra Bibi v. Zobeda Khatun* (1), *Gorachand v. Basant Kumar* (2), *Usir Ali v. Savai Behara* (3), *Upendra v. Shaikh Sabhan* (4), on the one side and the cases of *Nabin Chandra v. Prankrishna* (5), *Mani v. Ramtaran* (6) on the other side), we refer the following question for decision by a Full Bench namely, whether the power of the appellate Court with regard to a remand under section 107 of the Code of Civil Procedure is restricted to the case specified in order XLI rule 23 of the same Code or whether it is competent to the appellate Court to remand a case in which in the opinion of that Court there has been no proper trial.

*Mr. Buckland* for the Plaintiff : The expression "subject to such limitation as may be prescribed" in section 107 of the Code of Civil Procedure means "limitations prescribed under the rules." Rule 23, order 41 of the Code is both a *condition* and *limitation*. The whole scheme of the Code is to keep the questions or issues which have been decided, within the seizin of the appellate Court : In each of the cases of *Zohra Bibi v. Zobeda Khatun* (1) ; *Upendra v. Sabhan* (4) ; *Nabin v. Prankrishna* (5) ; *Mani v. Ramtaran* (6) ;

(1) (1910) 12 C. L. J. 368.

(3) (1916) I. L. R. 43 Calc. 938.

(5) (1913) I. L. R. 41 Calc. 108.

(2) (1911) 15 C. L. J. 258.

(4) (1911) 11 I. C. 183.

(6) (1915) I. L. R. 43 Calc. 148.

*Uzir Ali v. Savai Behara* (1) and *Norottam v. Mohanlal* (2), there was an addition of parties.

Section 151 has nothing to do with remands dealt with in section 107. Every order of remand must be made under order 41 rule 23. The appellate Court directs the original Court under rule 27 to take additional evidence on issues that are tried in such a manner that the decision cannot stand. This may include taking new evidence or recalling the same witnesses or offering them for cross-examination.

A judgment of the appellate Court in contravention of rule 31 of Order 41 of the Code, is not valid.

*Mr. B. C. Mitter* (*Officiating Advocate General*) (with him *Mr. C. C. Ghose*) for the Defendant : Courts have power to remand in cases other than those covered by rule 23. The Civil Procedure Code is not exhaustive. The inherent jurisdiction exists with regard to matters not covered by section 107 of the Code. Where any course of justice is necessary, the Court has power to remand. The word 'remand' is not defined in the Code. It means sending back for new trial.

The case of *Zohra v. Zobeda* (3) is not a departure from the older practice. The ends of justice require that there should be another trial. How that is to be done is a different matter.

The judgments of the Court were as follows :

*Sanderson, C. J.*—I think the reference may conveniently be considered in two parts.

First—whether the powers of the Appellate Court with regard to a remand under section 107 of the Code of Civil Procedure of 1908 is restricted to the case specified in order 41, rule 23 and 2nd—whether it is competent to the appellate Court to remand a case in which in the opinion of the Court there has been no proper trial.

*As regards the first part :*

In order to ascertain the intention of the legislature on this point I think it is useful to examine the state of the law at the time the 1908 Code was passed.

Under the Civil Procedure Code of 1882 the section which corresponded in effect to order 41, rule 23 was 562. That section however, was followed by 564 which provided that "The Appellate Court shall not remand a case for a second decision except as provided in section 562."

(1) (1916) I. L. R. 43 Calc. 938.

(2) (1912) I. L. R. 37 Bom. 289.

(3) (1916) 12 C. L. J. 368.

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Section 566 of the 1882 Code corresponded to order 41, rule 25 of the present Code.

It had been held that though the Code of Civil Procedure of 1882 bound all Courts as far as it went, it was not exhaustive and did not affect previously existing powers, and that in matters with which it did not deal the Court would exercise inherent jurisdiction to do that justice between the parties which was warranted by the circumstances and which the necessities of the case required and that in spite of the express provision of section 564 the appellate Court was not precluded from remanding a suit in a case to which neither section 562 nor section 566 applied. See *Habib Bakhsh v. Baldeo Prasad* (1) and *Hukum Chand Boid v. Kamalanand Singh* (2).

The law being as stated above with regard to the power of remand the 1908 Civil Procedure Code, was passed.

The scheme of this Code is different from that of 1882. A general power is given by section 107 which is made by its terms subject "to such conditions and limitations as may be prescribed" (which means prescribed by rules) and the provisions of sections 562 and 566 of the old Code are in effect reproduced in order 41, rule 23 and rule 25 and section 564 has not been re-enacted either in the Code itself or in the rules.

Further a new section applicable to this matter *viz.*, section 151 was introduced. This section is as follows:—"Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."

In my judgment it was not the intention of the legislature in the Code of 1908 to limit the powers of remand to the case specified in order 41, rule 23 but that it intended to and did recognise and preserve such powers as had been exercised theretofore.

I think it may fairly be argued that under section 107 read by itself, and having regard to the words "subject to such conditions and limitations as may be prescribed" the power of remand is limited to the case described in order 41, rule 23; but that does not dispose of the matter, for that section must be read together with section 151 which not only recognises but expressly preserves the inherent powers of the Court to make such orders as may be necessary for the ends of justice.

The question whether it is necessary for the ends of justice to

(1) (1901) I. L. R. 23 All. 167.

(2) (1905) I. L. R. 33 Calc. 927 (932); 3 C. L. J. 67.



exercise such powers of remand must depend upon the circumstances of each particular case and in exercising such jurisdiction the Court must no doubt be careful to see that its decision is based on general legal principles and subject to the rule that if the Code does contain specific provisions which would meet the necessities of the case in question, such provisions should be followed and the inherent jurisdiction should not be invoked.

In my judgment, therefore, the powers of the appellate Court as regards remand are not restricted to the case specified in order 41, rule 23 but the Court, by reason of its inherent jurisdiction, recognised and preserved in the Code as abovementioned, may order a remand in cases other than the case specified in order 41, rule 23 if it be necessary for the ends of justice.

As regards the second part of the reference I think on further consideration that it is couched in too general terms, and that an answer to such a general question might lead to difficulty and misapprehension and inasmuch as the answer to the first part of the reference is really sufficient to dispose of the matter, I do not think it is necessary to give a specific answer to the second part of the reference.

Woodroffe, J.—The reference raises two questions, firstly whether the Court's power of remand under section 107 is restricted to the case specified in order 41, rule 23 of the Code, and secondly, (if the answer be in the negative) whether it is competent to the appellate Court to remand a case in which, in the opinion of that Court, there has been no proper trial. These two matters should, I think, be kept distinct. As regards the first part of the reference, the power to remand is sought to be based both on section 107 of the Code and on the *inherent* jurisdiction. In my opinion section 107 cannot be relied upon as giving further powers than those which are specifically mentioned in the rules. This question of the relation between the body of the Code and the rules has been discussed in *Mani Mohan v. Ramtaran* (1) by Sir Lawrence Jenkins C. J. who took part in the framing of the new Code. I agree with what is there said and I need not repeat the whole of it. The body of the Code creates jurisdiction while the rules indicate the mode in which it is to be exercised. The body of the Code must, therefore, be read in conjunction with the rules either as existing at the date of publication of the Code, or as altered or added to subsequently. A contrary view might lead to difficulties,

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for (to take an example) it might be urged that section 114 of the Code gave the Court power to entertain a review in cases not covered by order 47, rule 1. I think, therefore, that the power of remand under section 107 is limited to the case described in rule 23, order 41. If this were not so, the rules would be unnecessary, for the general power of remand would cover not only order 41 rule 23, but every other conceivable case. But Sir Lawrence Jenkins went on to say "and this is the general rule except under special conditions which have no application in the circumstances of the case." What is it which authorises the Court to act in such cases? In my opinion we must invoke in such a case the inherent powers of the Court which are both recognised and saved by section 151 of the Code. I have dealt with this question whether the Code is exhaustive or not and whether the Court has inherent jurisdiction to pass such orders as justice requires in my judgment in *Hukum Chand Boid v. Kamalanand Singh* (1) and I, therefore, do not repeat what I have said there. Doubtless this exercise of inherent jurisdiction must be exercised with care subject to the general legal principles and to the condition that the matter is not one with which the legislature has so specifically dealt as to preclude the exercise of inherent power. But it is argued here that the Code has dealt with the subject of remand and has therefore indicated that it is not to be ordered except in the one specific instance mentioned in order 41 rule 23. I am not prepared to hold this, —the more so that section 564 of the previous Code has not been re-enacted. The mere fact that section 107 deals with remand does not exclude the Court's inherent jurisdiction to make orders of remand in cases other than those covered by order 41, rule 23. I am of opinion, therefore, that the powers of the appellate Court as regards remand are not limited to the specific case mentioned in order 41, rule 23, and that the Court, under its inherent jurisdiction to do what is right and necessary, may order a remand in cases other than those covered by that order if justice so requires it. Whether justice does require a Court to invoke its inherent jurisdiction, must be determined by that Court with reference to the particular facts of the case and the rule of law that a Court cannot invoke an inherent jurisdiction where there is a provision in the Code, whether by way of remand or otherwise, which, if applied, will meet the justice of the case. The merits of the particular application out of which this reference arose are hot before us.

The second part of the reference is in such wide terms that I (1) (1905) I. L. R. 33 Cal. 927.

feel a difficulty in answering it in a manner which will not lead to misapprehension. Thus the words a "proper trial" might include cases within O. 41, and an answer in the affirmative might enable the Courts to order wrongly a new trial although the particular case ought to be dealt with under the provisions of O. 41. It is the less necessary to do so as the Advocate General has stated that he will be satisfied with a decision given on the first part of the reference.

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**Mookerjee, J.**—The question referred for decision has been framed in the following terms: "Whether the power of the appellate Court with regard to a remand under section 107 of the Code of Civil Procedure is restricted to the case specified in order 41, rule 23 of the same Code, or, whether it is competent to the appellate Court to remand a case in which, in the opinion of that Court, there has been no proper trial.

I shall confine myself to an examination of the first branch alone of the question formulated; for, if it is answered in the negative, the second does not arise, while if it is answered in the affirmative, the second need not be considered, as it is not necessary for our present purpose to specify the limits of the power of remand, if such power is capable of exercise in cases other than those contemplated by order 41, rule 23.

Section 107 recognises the power of an appellate Court to remand a case, but such power is expressly made subject to such conditions and limitations as may be prescribed, that is prescribed by rules and forms contained in the first schedule or made under section 122 or section 125 [Section 2, clauses 16 and 18]. This, in my opinion, does not necessarily imply that wherever there is a provision in the rules relating to the matters mentioned in the section, the provision is by way of condition or limitation; whether a particular rule has or has not this effect must clearly depend on its terms. This is not inconsistent with the view indicated by Jenkins, C. J. in *Mani Mohan v. Ramtaran* (1), that the body of the Code creates jurisdiction while the rules indicate the mode in which it is to be exercised, which, it is important to observe is essentially different from the view adopted by Stephen, J. in *Nabin Chandra v. Prankrishna* (2), that the sections lay down general principles while the rules provide the means by which they can be applied and they cannot be otherwise applied as the rules restrict the provisions

(1) (1915) I. L. R. 43 Calc. 148.

(2) (1913) I. L. R. 41 Calc. 108.

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contained in the sections. I do not read order 41, rule 23 as a limitation on the power of remand recognised in section 107, in the sense that the power to remand can be exercised only in the contingency mentioned in order 41, rule 23. Apart from this, it seems to me to be incontestable that section 151, which embodies a statutory recognition of the inherent power of a Court to make such orders as may be necessary for the ends of justice, gives ample authority to the Court to make an order of remand in cases not comprised within order 41, rule 23, where the Court is satisfied that such order is necessary for the ends of justice. Section 151 does not recognise a new principle; it embodies a doctrine which had been enunciated by Sir Barnes Peacock in *Hurro Chunder v. Shoorodhoney* (1) and was re-stated and re-affirmed by Woodroffe J. and myself in *Panchanan v. Dwarka Nath* (2) and *Hukumchand v. Kamalanada* (3); I feel no doubt whatever that nothing in section 107 restricts in any manner the application of the principle of inherent power recognised by section 151. This was the view adopted by me, after careful consideration and in concurrence with Carduff, J., in *Zohra Bibi v. Zobeda Khatun* (4) and *Gorachand v. Basanta Kumar* (5). I see no reason to depart from that view, which has been subsequently followed in *Upendra v. Sabhan* (6), and *Usir Ali v. Savai Behara* (7). The decision of Jenkins, C. J. and N. R. Chatterjee, J. in *Mani Mahan v. Ram-taran* (8), also recognises the power of a Court of appeal to order a remand under special conditions not included in order 41, rule 23. I respectfully dissent from the contrary view expressed by Stephen and Mullick, JJ. in *Nabin Chandra v. Prankrishna* (9). That the Code itself recognises the power of a Court to direct a remand in circumstances other than those specified in order 41, rule 23 is clear from the terms of section 99. I am fortified in my conclusion by an examination of the condition of the law as it stood under the Code of 1882. Section 564 explicitly provided that the appellate Court shall not remand a case for a second decision except as provided in section 562; yet, the Courts had repeatedly claimed a power to direct a remand in circumstances not included in section 562. The Court sometimes traced the source of this authority to its inherent power

(1) (1905) 3 C. L. J. 29.

(2) (1868) 9 W. R. 402 (406); B. L. R. Sup. Vol. 985.

(3) (1905) I. L. R. 33 Calc. 927; 3 C. L. J. 67.

(4) (1910) 12 C. L. J. 368.

(5) (1911) 15 C. L. J. 258.

(6) (1911) 11 I. C. 183.

(7) (1916) I. L. R. 43 Calc. 938.

(8) (1915) I. L. R. 43 Calc. 148.

(9) (1913) I. L. R. 41 Calc. 408.

to make such orders as might be needed for the ends of justice, as in *Perumbra v Subrahmanian* (1), but on other occasions the Court, apprehensive as it were to invoke its inherent power, treated the authority as involved by implication in one or other of the provisions of the Code, for instance, in *Habib v. Baldeo* (2). See also *Jadab Gobinda v. Anath Bandhu* (3). While the law was in this condition, the legislature took two significant steps, namely, first, they refrained to reproduce in the Code of 1908 the restrictive provision contained in section 564, and, secondly, they introduced in the Code of 1908, section 151 which recognises in explicit terms the inherent power of a Court to make such orders as may be necessary for the ends of justice. The only inference legitimately deducible from this history of the legislation on the subject is that the legislature intended to place beyond all doubt and dispute the authority of an appellate Court to direct a remand and re-trial in cases other than those comprised in order 41, rule 23, where the Court is satisfied that such order is necessary in the ends of justice. There is, on the other hand, the significant fact that sections 584 and 585 of the Code of 1882, which enumerated the grounds for a second appeal and prescribed a restriction that a second appeal did not lie on any other ground, re-appear as sections 100 and 101 of the Code of 1908. The view that a Court of appeal is competent to direct a remand and re-trial in a case not covered by order 41, rule 23, if the Court is satisfied that such an order is necessary in the ends of justice, has been adopted in other High Courts under the Code of 1908: *Norottam v. Mohanlal* (4), *Kuppalam v. Kunjivalli* (5), *Jambulayya v. Rajamma* (6). It is undeniable that exceptional cases, not capable of exhaustive enumeration or classification, do sometimes occur in which defects of trial are so radical as to be incurable otherwise than by a re-trial *de novo*. In a case of this description, it is incumbent on the Court of appeal to exercise its inherent power to make such orders as, in its opinion, are required in the ends of justice. The exercise of such inherent power can only be invoked where the Court is satisfied that the specific provisions of the Code are not sufficient to meet the necessities of the case. The Court of appeal is invested with plenary powers to correct errors of procedure committed by the trial Court, as is clear from an examination of rules 24-29 contained in order 41 of the Code. These provisions cannot be arbitrarily disregarded on well-established principles, which regulate the exercise of inherent power by a

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(1) (1899) I. L. R. 23 Mad. 445.

(3) (1909) I. L. R. 37 Calc. 171.

(5) (1911) 9 M. L. T. 373.

(2) (1901) I. L. R. 23 All. 167.

(4) (1912) I. L. R. 37 Bom. 289.

(6) (1912) I. L. R. 36 Mad. 492.

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Court of justice as explained in the judgments in *Hukum Chand v. Kamalanand* (1), and *Panchanan v. Dwarka Nath* (2), but where the Court of appeal is satisfied that the correction of the omissions or defects in the trial is not reasonably practicable by recourse to one or other of the provisions mentioned, that is, where it is clearly apparent that the appellate Court cannot itself satisfactorily dispose of the suit on the merits by the adoption of the specific procedure mentioned in rules 24-29, a remand for re-trial is not only permissible but obviously incumbent on the Court. This view has been followed in practice in this Court for a long series of years, and this is obviously a case for the application of the maxim *cursum curiae est lex curiae*. In my opinion, the reference should be answered in the terms mentioned in the judgment of the learned Chief Justice.

Chitty, J.—The following question has been referred for decision by the Full Bench :—"Whether the power of the appellate Court with regard to a remand under section 107 of the Code of Civil Procedure is restricted to the case specified in order XLI. rule 23 of the same code, or whether it is competent to the appellate Court to remand a case in which in the opinion of that Court there has been no proper trial." These are really two separate questions, to which it would be inconvenient if not impossible to give a single answer.

Dealing with the first part of the question I confess that I was at first sight inclined to think that order XLI, rule 23 while prescribing a condition to a remand under section 107 (1) (b) did not impose any limitation on the power of an appellate Court under that section. There are no words of limitation to be found in rule 23. As was said by the Court in *Zohra Bibi v. Zobeda Khatun* (3), "Rule 23 makes provision for a particular contingency, but clearly its scope is neither exclusive nor all-embracing." Section 99, also, which precedes section 107 and which forbids a remand under certain circumstances seemed to me to imply that there may be cases of remand not covered by order XLI, rule 23. On the other hand, however, it may be reasonably urged that, if order XLI, rule 23 merely prescribes one contingency, in which a remand may be made, and leaves the general provisions of section 107 otherwise unfettered in this respect, then rule 23 is wholly unnecessary and superfluous, and the same might also be said of the other rules which regulate the powers of an appellate Court conferred by section

(1) (1905) I. L. R. 33 Calc. 927 ; 3 C. L. J. 67.

(2) (1905) 3 C. L. J. 29.

(3) (1910) 12 C. L. J. 368.

107, viz. rules 24 to 29 inclusive. It is obvious that this cannot have been the intention of the legislature which framed the present Code and rules together. It may be noted that by order XLIII rule 1 (u) the right of appeal is given only against an order under order XLI, rule 23 remanding a case. This indicates that the only order of remand under section 107 (1) (b) contemplated by the Code and rules as framed is one made under order XLI rule 23. I had the advantage of reading the judgment of Woodroffe J. and I agree with what he has said in this connection. This was also the view expressed by the late Chief Justice Sir Lawrence Jenkins in the case of *Moni Mohan Mandal v. Ramtaran Mandal* (1) and his opinion is entitled to all the more weight as he was in a great measure responsible for the Code of Civil Procedure and rules as they now stand.

It follows that the first part of the question must be answered in the affirmative, but the matter does not end there. I entirely agree that while the power of remand given to an appellate Court by section 107 (1) (b) is restricted by order XLI, rule 23, the inherent power of the Court which is expressly reserved to it by section 151 may be invoked to enable it to make an order of remand in circumstances which are not provided for by the Code or the rules. This power must be exercised with the greatest caution. It must not be exercised to enable the Court to pass an order contrary to the provisions of the Code or the rules. Nor can it properly be exercised in circumstances where the Code or rules provide an adequate remedy, as for example in the case *Mani Mohan Mandal v. Ramtaran Mandal* (1) above cited, which was a case of adducing additional evidence. A good example of a case to meet which there is no provision in the Code or rules is *Zohra Bibi v. Zobeda Khatun* (2), also above cited, which is the earliest of the cases now under review. Sir Lawrence Jenkins no doubt had this in mind when he said, "These rules provide that in the case of a lower appellate Court the power of reversal and remand is limited to the position described in rule 23, order XLI. And this is the general rule except under special conditions which have no application in the circumstances of this case." In this view of the matter the prohibition on remands contained in section 99 also becomes intelligible.

I do not think that the second part of the question can be properly answered by this Full Bench. The expression "case in which in the opinion of the appellate Court there has been no proper

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(1) (1915) I. L. R. 43 Calc. 148.

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trial" opens up questions of fact, into which this Bench cannot go. It is however unnecessary to discuss the matter further as the learned Advocate General stated that he would be content with an answer to the first question.

**Teunon, J.**—This reference arises out of an application for review of the judgment delivered in Appeal No. 27 of 1916, and the question referred to the Full Bench has been stated in the following terms: namely, whether the power of the appellate Court with regard to a remand under section 107 of the Code of Civil Procedure is restricted to the case specified in order 41, rule 23 of the same Code or whether it is competent to the appellate Court to remand a case in which, in the opinion of that Court, there has been no proper trial.

Section 107, sub-section (1) of the Code provides that subject to such limitations and conditions as may be prescribed, an appellate Court shall have power—

- (a) to determine a case finally,
- (b) to remand a case,
- (c) to frame issues and refer them for trial,
- (d) to take additional evidence or to require such evidence to be taken.

For the purposes of this reference sub-section (a) may be disregarded.

The limitations and conditions prescribed are to be found in the rules contained in the 1st schedule to the Code, that is in the rules contained in order 41.

It is now well-settled that as regards matters specifically dealt with by the Code, the provisions of the Code are exhaustive. It would seem to follow that when an appellate Court finds itself unable to arrive at a final determination, it should deal with the case under one or other of the sub-clauses (b), (c) and (d) in accordance with the circumstances set out in the appropriate rule. A case should therefore be remanded, in other words a *de novo* trial should be directed only where order 41, rule 23 is applicable, that is to say where the trial Court 'has disposed of the suit upon a preliminary point.'

In the course of the argument before us some stress was laid upon the omission from the present Code of the express prohibition of a *de novo* trial in other cases which was to be found in section 564 of the Code of 1882. To this omission I am unable to attach any great importance as in the view I take the provisions of section 564 of the last Code have been in effect incorporated in the wider



language used in the opening clause of section 107 (1), that is to say, in the words "subject to such limitations and conditions as may be prescribed."

I have set out above my view as to the general rule.

But section 107 contemplates and proceeds on the assumption that there has been in the first Court a fair and honestly conducted trial. But other exceptional cases may be conceived. It may be found that the trial Judge was disqualified by personal interest, or that owing to the attitude assumed by the Judge, either party has been precluded from putting forward his case. In such cases and in other cases, where for instance a minor has been improperly treated as a major, in all such cases (and I attempt no exhaustive enumeration of such special conditions) where it may be said that in effect there has been no trial, it is necessarily open to the appellate Court, in the exercise of the inherent jurisdiction for which section 151 of the Code now makes express provision to direct a remand or a re-trial.

Of the six cases decided by this Court that have been cited in the order of reference discussed in the argument before us, three namely, *Zohra Bibi v. Zobeda Khatun* (1), *Upendra v. Shaikh Sabhan* (2), *Usir Ali v. Savai Behara* (3), it may be observed, are cases where after adding parties the appellate Court directed a *de novo* trial. A remand in such cases may perhaps be supported under the provision of order 41, rule 23, the trial having been vitiated by the first Court's erroneous decision on the preliminary question of non-joinder and by the absence of the assistance which the added party was in a position to give. Otherwise the decision is justified under section 151 of the Code. These three cases, the case of *Gorachand v. Basant Kumar* (4) and the observations of Jenkins C. J. in *Mani v. Ramtaran* (5) support in my opinion the view I take. The remaining case *Nabin v. Prankrishna* (6), may possibly be said to be against it but it is doubtful whether in that case the learned Judge had in view the exceptional circumstances which may make recourse to section 151 necessary.

For the above reasons subject to the foregoing observations my answer to both branches of the question referred to us is in the affirmative.

*Messrs. Leslie & Hinds* :—Attorney for the Petitioner.

*Mr. H. C. Banerjee* :—Attorney for the Opposite Party.

D. K. R. *First part of the reference answered in the affirmative.*

(1), (1910) 12 C. L. J. 368.

(2) (1911) 11 I. C. 183,

(3) (1915) L. L. R. 43 Calc. 938.

(4) (1911) 15 C. L. J. 258.

(5) (1915) L. L. R. 43 Calc. 148.

(6) (1913) L. L. R. 41 Calc. 108.

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# APPEAL FROM ORIGINAL CIVIL.

*Before Sir Lancelot Sanderson, Knight, Chief Justice, and Sir*

*Asutosh Mookerjee, Knight, Judge.*

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*Contract—C. I. F. Contract—Rights and liabilities of parties—Payment to be made afterwards—Executory contract made with alien enemy before war, when can be avoided or dissolved—Contract, when incapable of suspension—Prize Court, jurisdiction of—Bills of lading—Contract Act (IX of 1872), Sec. 56.*

The rights and liabilities of parties to a C. I. F. contract were formulated by Hamilton J. in *Biddell Bros. v. Clemens Horst Co.* (1).

Where in a C. I. F. contract payment was to be made, not against the document, but forty-eight days after the goods had been landed, the vendor was under no obligation to hand over the documents to the vendee immediately on receipt thereof; he could tender the documents on arrival of the goods, or might take delivery himself and make over the goods to the vendee.

An executory contract made with an alien enemy before war is avoided or dissolved by the outbreak of war, if it enures to the aid of the enemy, or, if it is in its nature incapable of suspension. A contract is deemed in its nature incapable of suspension if its proper performance necessitates intercourse with the enemy during the war, or where time is of the essence of the contract, or the parties cannot, on conclusion of peace, be made equal.

*Cases on the points referred to.*

The Prize Court alone has jurisdiction to determine the question of freight and the conditions whereon the cargo should be released. The Prize Court deals with such claims in accordance with the Law of Nations and upon equitable principle freed from contracts, which almost always cease to have effect upon capture or seizure by reason of the non-appearance or non-completion of the contract of affreightment; it may, indeed, discard the contract rate altogether even as a basis for assessment or calculation.

Where a ship is condemned but the goods released, the Crown is entitled to impose the payment of freight as a condition of their release, and has a lien on them till it is paid. The original bills of lading would be of no avail whatever, unless the consignee complied with the conditions imposed by the Prize Court; they would be useful for identification of the assignee in whose favour the Prize Court had decided to release the goods, but they had ceased to be operative legal documents, and delivery on their basis could not be claimed as a matter of right. Hence the contract of affreightment and therewith the C. I. F. contract of sale in the present case, became void on the outbreak of war. Consequently the rights and liabilities of the parties thereafter must be determined with reference to the second paragraph of section 56 of the Indian Contract Act, and no question of damages for breach thereof arises.

\* Appeal from Original Decree No. 36 of 1916, against the decree of Mr. Justice Chaudhuri, dated 14th February, 1916, sitting on the Original Side.

(1) (1911) 1 K. B. 214.

Appeal by the Defendant.

Suit for damages for breach of contract.

The material facts are stated in the following judgment of

**Chaudhuri, J.**—The plaintiff firm sues to recover Rs. 3563-14-6 as damages for breach on the part of the defendant firm of a contract dated 2nd February, 1914, by which they agreed to sell 150 tons basic steel bars to be shipped in June, July and August, 1914, in equal proportions. The plaintiffs allege that in pursuance of the said agreement they paid for and took delivery of the June shipment, and they received invoices in respect of the July shipment of the said goods on the 2nd October, 1914, the goods actually arriving in Calcutta on or about the 2nd January, 1915: that thereupon they offered to pay for and take delivery of the July shipment, but the defendant firm put them off under various pretexts. The time for delivery of the said goods was extended, according to the plaintiffs, by mutual consent till the 12th February, 1915. They allege that they made a tender on the 19th January, 1915, which was not accepted.

The defendants in their original written statement admitted the agreement, but denied that the plaintiff firm paid for and took delivery of the June shipment, alleging that the defendant firm had to institute a suit to recover the price of the said goods in which they obtained a decree on the 26th January, 1915. They allege that copies not the original invoices of the July shipment were sent to the plaintiffs, and that on arrival of the said goods on the 2nd January, they called upon the plaintiff firm to take delivery in accordance with the terms of the contract of the 2nd February, 1914, but the plaintiffs failed and neglected to take delivery in terms of the contract. They denied that any time had been extended for delivery and submitted that the defendant firm had a lien on the goods of the July shipment for the price of the goods of the two shipments, namely, of June and July, inasmuch as the plaintiff firm had committed a breach of the contract by not paying the price thereof. They denied that the plaintiffs were ready and willing, and alleged that the tender was not valid or proper. They further alleged that without prejudice to their rights they, on or about the 27th January, 1915, at the request of the plaintiff firm, offered to deliver the goods of the July shipment on receipt of the price, godown rent and charges, but the plaintiff firm refused to take delivery of the goods on those terms.

When the case came on to be heard, counsel for the defendants raised various issues which were not covered by the original written

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statement. I thereupon directed them to put in a further written statement which was filed on the 30th November, 1915. The points raised in this written statement were: (1) that the goods were shipped from Antwerp on or about the 2nd July, 1914, per S. S. "Steinturm": On the outbreak of the war the said steamer which was on the high seas became liable to seizure, and was in fact seized and detained by His Majesty's Government at Colombo and was subsequently condemned with all the cargo on board by the Colombo Prize Court, and that accordingly the contract with the plaintiffs became impossible of performance.

(2) That alternatively should this Court come to a contrary conclusion, the charges specified in a bill of the defendants alleged to have been sent to the plaintiffs on the 23rd February, 1915, were proper charges, but inasmuch as the plaintiffs refused to pay same, they could not get delivery of the goods. They further submitted that on the outbreak of the war the contract became unlawful and the defendant firm was discharged from all liability thereunder. They also denied that the market rate was correctly stated in the plaint.

Having regard to the contention so raised by the defendant firm the plaintiffs asked for leave to amend the plaint and submitted in the alternative that they were entitled to the reliefs claimed in this suit on the footing that both the parties treated the said contract as subsisting on the arrival of the said goods in Calcutta, and that the defendant firm was estopped by its conduct as evidenced by the correspondence between the parties from relying upon any alleged discharge of the said contract.

The defendants have denied that they ever treated the contract as subsisting on the arrival of the said goods.

The contract in this suit is contained in a letter, dated 2nd February, 1914—"It is for 150 tons basic steel bars with usual ten per cent. second class extras at £5-7-6 per ton c. f. i. that is, Free Hooghly shipment in three monthly lots commencing June, 1914. Delivery to be completed within 3 days from the date of the landing of the goods. Terms 45 days' credit from the date of the delivery of the goods, failing which due date will be calculated from the due date of the delivery, that is, 3 days from the landing of the said goods." The sale purported to be made on the basis "of the existing terms and conditions in the contract for these classes of goods as are current in the market."

The undisputed facts of the case are as follows:—

That the plaintiffs failed to pay the price of the June shipment

and a suit had to be instituted against them which was decreed on the 26th January, 1915 : that copies of three invoices were sent to the plaintiffs by the defendant firm of the goods per S. S. "Steinturm." In or about the end of September, 1914, the defendant firm asked the plaintiffs to keep themselves in readiness to pay for the goods in cash against shipping documents on arrival of the steamer. See their letter, dated  $\frac{2}{3}$  September, 1914. Apparently there was a mistake in the invoices as regards the weight, and the plaintiffs called upon the defendants to correct it, but the defendants stated that they were not liable to make any corrections. On the 2nd January 1914, the defendant firm intimated to the plaintiffs that the vessel had arrived in Port and requested them to take delivery of the goods by paying for them as early as possible. The cause of late arrival was the seizure of the steamer at Colombo.

By an order dated 25th August 1914, on the application of the Crown, the steamer was handed over by the Colombo Prize Court to the custody of the principle Collector of Customs, and the following undertaking and decree was entered of record, namely, "The Solicitor-General on behalf of the Crown undertakes that the Crown will restore the ship to its present place, whenever it is called upon to do so by this Court, if the Government of Ceylon on behalf of the Crown are allowed to take charge of the ship; and moves that the Crown be allowed to take charge of the ship on these terms. It is ordered and decreed that the application be allowed and that the Marshal be directed to let the Government of Ceylon have possession of the ship, after the cargo, goods, wares and merchandize have been ware-housed. It is further directed that the Marshal shall require from any person taking over the ship on behalf of the Government an authority to do so, signed by His Excellency the Governor or by the Colonial Secretary." The President of the Prize Court appears to have made an order on the 19th November 1914 that inasmuch as the steamer contained general cargo sent to Madras, Calcutta and Chittagong it was for the interest of all persons concerned that the cargo entitled to release which was consigned to Calcutta, should be delivered at Calcutta; it was further ordered that "in the event of the Crown in the exercise of its power conveying the said cargo to Calcutta, the Crown was authorised to recover against all cargo released and delivered, certain expenses namely,

in respect of freight Rs. 15-50 per ton weight or measure,

in respect of agency charges, such reasonable expenses as may be incurred".

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And that the steamer was not to depart from Colombo until after the expiration of 3 weeks from the date of that order. On the 2nd September 1914, the Prize Court on hearing the Attorney-General made the following order, that the Marshal be authorised for the purpose of warehousing the cargo to put the cargo in the hands of the Crown, the Attorney-General undertaking on behalf of the Crown that in the event of the cargo or any part of it being removed out of the jurisdiction of this Court, it was to be brought back within the jurisdiction upon the order of the Court." What happened, was, that Messrs. Graham & Co., merchants of Calcutta were employed as agents on behalf of the Crown to give delivery of the goods, consigned to Calcutta to the consignees. Graham & Co., thereupon, communicated with the defendant firm in respect of the July shipment of the goods which had come out in that steamer, and these goods arrived, as stated above, on the 2nd January. The defendant firm had to pay certain charges for freight and commission to Messrs. Graham & Co. for these goods. The defendants allege that by the said letter dated 23rd February 1915, they gave particulars of the cost and charges incurred by them in respect of the consignment including therein the charges occasioned by the seizure and release. That prior to that date and after the arrival of the goods in Calcutta some correspondence ensued. The defendant firm wrote to the plaintiffs on the 4th January 1915 that unless the plaintiff firm immediately sent the price of the goods of the June shipment which had already been delivered to them, as also the price of the goods per S. S. "Steinturm" they would be compelled to resell the goods on the plaintiffs' account. The plaintiffs wrote on the same date that they were prepared to pay for and take delivery of all the goods with the exception of 22 pieces of basic steel bars, the weight of which had been incorrectly stated in the invoice. They said that if they (defendants) failed to make over the bill of lading for the goods they would not be liable for any wharf rent, if incurred. On the 8th January the plaintiffs said that they were prepared to pay the full price of the three lots which had come per S. S. "Steinturm" on the defendant firm handing over to them the bills of lading and other documents. They offered to pay the necessary charges for obtaining delivery of the goods from the jetties, and asked for information as to the exact amount payable by them. There was no reply to this letter. On the 19th January they offered Rs. 4,370 as being the price of the goods including the usual charges. On the 27th January Charu Chandra Bose attorney for the defendants wrote to the plaintiffs' attorneys the following

letter :—"As arranged my clients are now ready to deliver the goods demanded by you on receipt of the price godown rent and charges." It will be noticed this letter was written the day after the decree above referred to. It was a consent decree, and the defendants say that terms arranged between the parties were that the goods of the July shipment would be taken delivery of by the Plaintiffs after payment of all dues, that Nepal Chand on behalf of the plaintiffs 'agreed to pay all cost in respect of the July shipment freight etc., that is to say the extra freight and other charges incurred in respect of the consignment'. This arrangement is entirely denied by the plaintiffs. No reply was sent by the plaintiffs to that letter until the 4th February, 1915, when they said that nothing had been arranged as suggested by the defendants. They said that the defendants were not entitled to godown rent, and refused to pay same. They complained that the defendants had not specified what charges they were claiming, and expressed their readiness and willingness to pay the price of the goods and the duty, landing and proper charges in respect thereof as was usual in the case of deliveries ex-jetty. On the 4th February the defendants' attorney said that if the goods were not taken delivery of within 3 days, the defendants would resell on the plaintiffs' account. Apparently these two letters crossed each other. On the 9th February the defendant firm said that the price and charges to be paid were mentioned in their bills sent to the plaintiffs. Over and above that, the plaintiffs would have to pay godown rent and cartage for the removal of the goods, and unless the plaintiffs took delivery of the goods within three days, the defendants would resell the goods on the plaintiffs' account and risk. On the 12th February, the plaintiffs denied that any bills had been submitted to them for payment and refused to pay godown rent and other incidental charges. Nothing further was done by the plaintiffs until the 8th March when their attorneys wrote a letter to the defendants' attorney asking for a statement of the charges the defendants claimed in respect of the said goods, and if they found the same reasonable and proper, they would ask the plaintiffs to take delivery. On the 10th March, they were informed that the defendants had sold the goods to a third person.

It is quite clear from the correspondence that the defendants treated the contract as subsisting. They had called upon the plaintiffs to take delivery according to the terms of the contract and they threatened to resell the goods on the plaintiffs' account.

In the first written statement also nothing was said about the contract having been put an end to by seizure of the steamer at

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Colombo. The case now is that by the seizure of the steamer at Colombo the contract was put an end to, and the voyage terminated there, and the correspondence after the arrival of the goods must be treated as merely an offer on the part of the defendant firm to deliver on certain terms, but inasmuch as the plaintiffs did not agree to take delivery on those terms, the plaintiffs were not entitled to recover anything in this suit. To determine the points so raised, it is necessary to consider the following points :—

None of the contracting parties in this case is an alien enemy, they may be taken to have been British subjects. The contract was concluded before the declaration of war. The goods were partly of Belgian manufacture and partly German. They were purchased from a friendly trading company. (The Belgo-Asiatic Trading Co.) who shipped the goods at a friendly port (Antwerp) before the declaration of war, namely on the 2nd July, 1914. The goods such as were of German origin had become the property of a friendly firm at the time of shipment. The steamer was German. It was seized at Colombo, by His Majesty's Government. On the 25th August 1914, the Ceylon Admiralty Court directed the Marshal to let the Government of Ceylon have possession of the ship "after the cargo, wares and merchandise had been warehoused." This was a seizure of the ship apparently not of the goods.

On the application of the Crown, the Ceylon Court by its order, dated the 2nd September 1914, authorised the Marshal to make arrangements for warehousing the cargo on board that steamer at Calcutta. Then by its order, dated the 19th November, 1914, it authorised delivery at Calcutta "of the cargo entitled to release" and which was consigned to Calcutta. Messrs. Graham & Co. acted as agents for the Ceylon Government and gave delivery of the goods to the consignees. The goods arrived on or about the 2nd January 1915, and were actually delivered to the defendant firm about the 11th of January, 1915.

This is an executory contract which was concluded before the outbreak of war. Such contracts even with an alien enemy are merely suspended during the war as regards the right to performance and right of action, and are avoided or dissolved only in certain circumstances, among them, if its performance necessitates intercourse with the enemy during the war : *Esposito v. Bowden* (1). It is argued in this case that inasmuch as the goods were on board a German steamer, the performance of the contract necessitated intercourse with the enemy, which was prohibited by the Enemy



Proclamation No. 2 of the Crown, dated 9th September, 1914, clause (5), sub-clause (7), which runs thus:—"Not directly or indirectly to supply to or for the use or benefit of, or obtain from, an enemy country or an enemy any goods, wares or merchandise, nor directly or indirectly to supply to or for the use or benefit of, or obtain from any person any goods wares or merchandise, for or by way of transmission to or from an enemy country or an enemy, nor directly or indirectly to trade in or carry any goods, wares or merchandise destined for or coming from an enemy country or an enemy." This clause was considered by this Court in the case of *India Chand v. King-Emperor* (1). This clause divides itself into three parts. Mr. Justice Greaves summarised the clause as follows. Clause 5 (7), divides itself into three parts and forbids (1) the supply of goods etc. to or for the use of the enemy or the obtaining goods etc. from the enemy, (2) the supply of goods by way of transmission to or from the enemy, (3) trading in or carrying of goods destined for or coming from the enemy and the direct or indirect carrying out of any of the acts above mentioned is prohibited by the sub-clause.

These goods were not coming from or going to any alien country. They were being carried in an alien ship and that ship was seized at Colombo. After seizure the goods were recognised as being entitled to release and were released. This was I believe due to the decision of this Court in *Re. Cargo ex. S. S. "Rappensfels"* (2). Section 56 of the Contract Act deals first with an agreement impossible in itself which this is not, and next with contracts which become impossible or unlawful after they are made. The contract was to deliver at Calcutta. Such delivery in Calcutta of goods recognised as being entitled to release was not unlawful and certainly not impossible. It is clear law that a temporary embargo such as seems to have been the case here does not invalidate a contract. No doubt a promise is excused by a supervening impossibility caused by act of law, *Atkinson v. Ritchie* (3), but a temporary interruption of the voyage followed by a release of the goods as being entitled to release, does not in my view avoid the contract. No authority has been cited to me to the contrary. The goods were in the custody of the Crown at the time of the above proclamation. The voyage was interrupted, but was continued by the Crown and the goods were delivered by the agents of the Crown at Calcutta to the consignees, and I do not think it is right to hold that the contract

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(1) (1915) 19 C. W. N. 1239 ; L. L. R. 42 Calc. 1094.

(2) (1914) I. L. R. 42 Calc. 334.

(3) (1809) 10 East. 531 (534).

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was at an end at the time the ship was seized. This again is an unconditional contract and as a general rule such contracts are not dissolved by their performance becoming impossible owing to war. Here in fact the performance was possible and the plaintiffs were invited by the defendant firm to take delivery on the arrival of the vessel at Calcutta, see the defendants' letter dated the 2nd January, 1915. The defendants in their letter of the 4th January, threatened to resell the goods on the plaintiffs' account if they did not pay for them. The plaintiffs tendered the price of these goods including the usual charges on the 19th January, 1915, which the defendants did not accept. Then comes the alleged agreement on or about the 26th January, 1915, at the time of the consent decree. The defendants' Gomastha Ramdas Goenka is the only witness who spoke about it. He gave a confused account as to how and where the agreement was arrived at. The Court minutes of the 26th January relating to the consent decree do not show that the terms had been arrived at beforehand. There appears to have been a discussion with regard to the terms at that time. Goenka is not corroborated by any one. The letter of the defendants dated the 27th January suggesting an arrangement loses much of its value, having regard to the denial, although tardy, of the plaintiffs on the 4th February. I cannot therefore hold that the agreement has been established.

Apart from the letter dated 23rd February 1915 Ex. 10, there is nothing in the correspondence to show that the items of charges claimed by the defendants due to the seizure and release were ever specified. Defendants' letter of the 9th February mentions a bill having been sent. The plaintiffs deny that they ever received such a bill. The evidence of the delivery of that bill is not satisfactory, but in all likelihood it was sent. It appears that the defendants sent similar letters to other buyers, some of whom, it was stated, paid under protest. The plaintiffs submit that they were entitled to get the bills of lading on payment of the amount of the draft according to the invoice, and if they could not get delivery of the goods without paying the extra freight and charges to Messrs. Graham & Co., they would have paid the amount to them. It seems to me that neither party was quite clear in their minds as to who was liable for the extra freight and charges in respect of these goods on account of the seizure and release, and in consequence the correspondence is not at all clear about the matter. Both parties apparently were fencing over that question. Pannalal Seal one of the plaintiffs stated in the witness-box that he was not prepared to pay unconditionally

the cost incurred between Columbo and Calcutta ; that he was prepared to pay "if he got the charges, *i. e.*, if he realised them from the Insurance Company—the Company with whom the goods were insured. If he could not so realise the loss would be his." He said "I want the right to recover from the Insurance Co. If I cannot get it from that Company, then I shall sue the defendants. I shall pay the charges, if I am entitled in law to recover the charges. I shall recover it from the party from whom I am so entitled." "If it is properly payable by me I am prepared to pay. I do not know whether it is properly payable by me, as no demand has been made from me, so I have made no offer up to now. If demand was made I would have consulted my lawyers." That evidence makes it quite clear to me that the plaintiffs had not made up their minds as to whether they were to pay these charges or not but it seems to me that the defendants were not justified in keeping back the bills of lading when they were offered the amount covered by the invoices and usual charges of landing to the plaintiffs. What seems to have actuated the defendants, was firstly that the plaintiffs had failed to pay for the June consignment, and nextly the market having risen owing to the war. They were not quite sure as to whether they were justified in asking for the extra charges. Having regard to the fact that the contract was C. I. F., I think that the plaintiffs were entitled to receive the documents of title to enable them to obtain delivery of the goods. If they were not prepared to pay the amount claimed by Graham & Co. for the extra charges, they would not have got the goods, but I do not think the defendants were justified in refusing to give delivery of the documents. They need not have taken delivery of the goods but may have left the plaintiffs to take their own course with Messrs. Graham & Co. There was no duty cast upon them to take delivery of the goods. They need only have done so on failure of the plaintiffs. Taking everything into consideration, I hold that the plaintiffs were ready and willing to take delivery and the defendants have failed to perform their part of the agreement which subsisted in spite of the seizure at Columbo. The only question therefore left remaining is the market rate. The plaintiffs' evidence is mainly that of retail dealers and it is well known that retail prices are higher than wholesale rates. The defendants by their letter of the 9th February gave three days further time, and therefore the time may be taken as having been extended up to the 12th February and the plaintiffs have given evidence of the market rate about that date. The defendants on the other hand have only proved a sale

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on the 31st January at Rs. 5-10 per cwt. of some flat iron. They have given no other evidence. Plaintiffs' counsel submits that their evidence shows that an average rate of Rs. 8-8 per cwt. has been made out. The price therefore of the goods would be about Rs. 9,025-6. As against that, the contract price including jetty Rs. 52-13-9 and customs Rs. 58-2 was Rs. 4,408-4. Deducting therefrom the discount for 45 days, Rs. 42 brings the figure down to Rs. 4,366-4. The balance thus shown is Rs. 4,659-2, but they are claiming Rs. 3,563-14-6 in this suit. Having regard to the fact that the market rate as proved is somewhat unsatisfactory and as the defendants actually paid the extra freight and charges, I think it would be fair to allow the plaintiffs a decree for Rs. 2,500 only with costs on scale No. 2, including reserve costs.

Against this decision, the defendants appealed.

*Messrs. C. C. Ghose and K. P. Khaitan* for the Appellants.

*Messrs. S. R. Das and B. L. Mitter* for the Respondents.

C. A. V.

The judgments of the Court were as follows :

February. 7.

**Sanderson, C. J.**—This is an appeal by the defendants Madhoram Hurdeo Das against the decision of Chaudhuri J., whereby he gave judgment for the plaintiffs for Rs. 2,500 as damages for breach of contract and costs.

The contract was contained in a letter written by the defendants to the plaintiffs and dated 2nd February 1914 as follows :—

"Calcutta 2nd February 1914.

"Messrs. G. C. Sett and B. R. Sett,

Calcutta.

"Dear Sir,

We beg to enter as having sold you through broker P. N. Mukerji 150 tons basic steel bars with usual 10 per cent. 2nd class extras at £5-7-6 per ton C. I. F., i. e. free Hooghly shipment in three monthly lots commencing June i. e. June, July, August 1914. Delivery to be completed within three days from the date of the landing of the goods. Terms 45 days credit from the date of the delivery of the goods, failing which due date will be calculated from the due date of the delivery i. e. three days from the landing of the goods.

This sale is made on the basis of the existing terms and conditions in the contracts for this class of goods as are current in the market. Interest at the rate of 8 per cent. per annum to be charged

on any money unpaid after the due date and rebate for payments before the due date will be allowed at the same rates. You have the option to have the goods weighed so as to arrive at the actual weighment and in that case you shall have to notify us, so that we may make necessary arrangements to have our man present. But in any case, claim for weighment will not be entertained, if made after three days after the arrival of the goods in your godowns from the jetty, and the invoice weight shall be accepted by you as the correct one.

Please confirm.

Yours faithfully,

Madhoram Hurdeodass."

The July consignment was shipped by the Belgo-Asiatic Trading Company, from whom the defendants had bought the goods, on the 2nd July 1914 at Antwerp on board the S. S. "Steinturm" which was a German vessel. Some of the goods were made in Belgium, others were made in Germany as appears from the invoices in respect of the goods. Neither the bill of lading nor the policy of insurance was produced in Court, but it was assumed for the purpose of the appeal by both sides that the bill of lading was made out in the name of the defendants and that the contingency which happened *vis.*, the capture and condemnation of the ship and the consequent expenses were not covered by the policy of insurance.

At the time of the declaration of war against Germany namely on the 4th August 1914 the "Steinturm" was at sea, and at some time subsequently, which has not been proved, she was captured by a British ship and taken to Colombo: The "Steinturm" was condemned by the Prize Court but the cargo in question was released and inasmuch as the ship was carrying a general cargo consigned to Madras, Calcutta and Chittagong, it was ordered on the 19th November 1914 by the Prize Court that in the event of the Crown in the exercise of its power under a previous order dated 2nd September 1914 consigning the said cargo to Madras and Calcutta the Crown be authorised to recover against all cargo released and delivered at Madras and Calcutta in respect of freight Rs. 15'50 per ton and in respect of agency charges such reasonable expenses as might be incurred.

Consequently the consignment in question was carried in the "Steinturm" under the abovementioned order and arrangement to Calcutta and arrived there on or about the 2nd January 1915 the freight for the carriage from Colombo to Calcutta was Rs. 818-14-0 as is shown from the bill dated the 23rd February 1915; in addition

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there were Rs. 82 for charges in respect of release from the Prize Court and other expenses in consequence of the capture of the "Steinturm" and the conveyance of the cargo from Colombo to Calcutta.

The course of events may be taken from the learned Judge's summary of what he describes as the undisputed facts of the case as follows:—

"That the plaintiffs failed to pay the price of the June shipment and a suit had to be instituted against them which was decreed on the 26th January 1915: That copies of three invoices were sent to the plaintiffs by the defendant-firm of the goods per S. S. "Steinturm." In or about the end of September 1914 the defendant firm asked the plaintiffs to keep themselves in readiness to pay for the goods in cash against shipping documents on arrival of the steamer. See their letter dated 23rd September 1914. Apparently there was a mistake in the invoices as regards the weight, and the plaintiffs called upon the defendants to correct it, but the defendants stated that they were not liable to make any corrections. On the 2nd January 1915 the defendant firm intimated to the plaintiffs that the vessel had arrived in port and requested them to take delivery of the goods by paying for them as early as possible. The cause of late arrival was the seizure of the steamer at Colombo.

By an order dated 25th August, 1914, on the application of the Crown, the steamer was handed over by the Colombo Prize Court to the custody of the principal Collector of Customs, and the following undertaking and decree was entered of record, namely, "the Solicitor-General on behalf of the Crown undertakes that the Crown will restore the ship to its present place, whenever it is called upon to do so by this Court, if the Government of Ceylon on behalf of the Crown are allowed to take charge of the ship, and moves that the Crown be allowed to take charge of the ship, on these terms. It is ordered and decreed that the application be allowed and that the Marshal be directed to let the Government of Ceylon have possession of the ship, after the cargo, goods, wares and merchandize have been ware-housed. It is further directed that the Marshal shall require from any person taking over the ship on behalf of the Government an authority to do so, signed by His Excellency the Governor or by the Colonial Secretary." The President of the Prize Court appears to have made an order on the 19th November, 1914, that inasmuch as the steamer contained general cargo sent to Madras, Calcutta and Chittagong it was for the interest of all persons concerned that the cargo entitled to release which was

consigned to Calcutta, should be delivered at Calcutta, it was further ordered that "in the event of the Crown in the exercise of its power conveying the said cargo to Calcutta the Crown was authorised to recover against all cargo released and delivered, certain expenses namely :

"In respect of freight Rs. 1550 per ton weight or measure.

"In respect of agency charges, such reasonable expenses as may be incurred."

"And that the steamer was not to depart from Colombo until after the expiration of 3 weeks from the date of that order. On the 2nd September, 1914, the Prize Court on hearing the Attorney-General made the following order, that the Marshal be authorised for the purpose of ware-housing the cargo to put the cargo in the hands of the Crown, the Attorney-General undertaking on behalf of the Crown that in the event of the cargo or any part of it being removed out of the jurisdiction of this Court, it was to be brought back within the jurisdiction upon the order of the Court." What happened, was, that Messrs. Graham & Co., merchants of Calcutta were employed as agents on behalf of the Crown to give delivery of the goods consigned to Calcutta to the consignees. Graham & Co., thereupon, communicated with the defendant-firm in respect of the July shipment of the goods which had come out in that steamer, and these goods arrived, as stated above, on the 2nd January. The defendant firm had to pay certain charges for freight and commission to Messrs. Graham & Co., for these goods. The defendants allege that by the said letter, dated 23rd February, 1915, they gave particulars of the costs and charges incurred by them in respect of the consignment including therein the charges occasioned by the seizure and release. That prior to that date and after the arrival of the goods in Calcutta some correspondence ensued. The defendant firm wrote to the plaintiffs on the 4th January, 1915, that unless the plaintiff firm immediately sent the price of the goods of the June shipment which had already been delivered to them, as also the price of the goods per S. S. "Steinturn" they would be compelled to resell the goods on the plaintiffs' account. The plaintiffs wrote on the same date that they were prepared to pay for and take delivery of all the goods with the exception of 22 pieces of basic steel bars, the weight of which had been incorrectly stated in the invoice. They said that if they (defendants) failed to make over the bill of lading for the goods they would not be liable for any wharf rent, if incurred. On the 8th January, the plaintiffs said that they were prepared to pay the full price of the three lots which

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had come per S. S. "Steinturm" on the defendant firm handing over to them the bills of lading and other documents. They offered to pay the necessary charges for obtaining delivery of the goods from the jetties, and asked for information as to the exact amount payable by them. There was no reply to this letter. On the 19th January, they offered Rs. 4,370 as being the price of the goods including the usual charges. On the 27th January, Charu Chandra Bose attorney for the defendants wrote to the plaintiffs' attorneys the following letter:—"As arranged my clients are now ready to deliver the goods demanded by you on receipt of the price godown rent and charges." It will be noticed this letter was written the day after the decree above referred to. It was a consent decree and the defendants say that terms arranged between the parties were that the goods of the July shipment would be taken delivery of by the plaintiffs after payment of all dues, that Nepal Chunder on behalf of the plaintiffs agreed to pay all costs in respect of the July shipment freight and that is to say, the extra freight and other charges incurred in respect of the consignment. This arrangement is entirely denied by the plaintiffs. No reply was sent by the plaintiffs to that letter until the 4th February, 1915 when they said that nothing had been arranged as suggested by the defendants. They said that the defendants were not entitled to godown rent, and refused to pay same. They complained that the defendants had not specified what charges they were claiming, and expressed their readiness and willingness to pay the price of the goods and the duty, landing and proper charges in respect thereof as were usual in the case of delivery ex-jetty. On the 4th February the defendants' attorney said that if the goods were not taken delivery of within 3 days, the defendants would resell on the plaintiffs' account. Apparently these two letters crossed each other. On the 9th February the defendant firm said that the price and charges to be paid were mentioned in their bills sent to the plaintiffs. Over and above that, the plaintiffs would have to pay godown rent and cartage for the removal of the goods, and unless the plaintiffs took delivery of the goods within three days, the defendants would resell the goods on the plaintiffs' account and risk. On the 12th January the plaintiffs denied that any bills had been submitted to them for payment and refused to pay godown rent, and other incidental charges. Nothing further was done by the plaintiffs until the 8th March when their attorneys wrote a letter to the defendants' attorney asking for a statement of the charges the defendants claimed in respect of the said goods and if they found the same reasonable and



proper, they would ask the plaintiffs to take delivery. On the 10th March they were informed that the defendants had sold the goods to a third person."

The action was brought for breach of contract caused by the failure of the defendants to make over the bill of lading or to deliver the goods and the main point which was argued in this appeal was not taken by the defendants until the trial, when the learned Judge allowed the defendants to amend their defence as follows :—

"With further reference to paragraph 3 of the plaint herein the defendant firm state that the goods forming the July shipment referred to in the said paragraph were shipped from Antwerp on or about the 2nd day of July 1914 per S. S. "Steinturm." On the outbreak of war between His Britannic Majesty's Government and the German Empire on the 4th day of August 1914, the said steamer which was on the high seas became liable to seizure by the Naval forces of His Majesty's Government and as a matter of fact the said steamer was captured, seized and detained by His Majesty's Government at or near Colombo and was subsequently condemned with all the cargo on board by the Colombo Prize Court. The defendant firm submit that on such condemnation of the said steamer and of the cargo therein including the said goods, the contract with the plaintiffs became impossible of performance."

It is clear from the order of the Prize Court that though the ship was condemned, the cargo in question was not condemned. It was however argued that although the cargo was eventually released the outbreak of war rendered the performance of the contract of 2nd February 1914, impossible or at all events it rendered the contract of affreightment which was an implied part of the contract unlawful and consequently by reason of the provisions of section 56 of the Indian Contract Act, 1872 the contract was void.

This defence necessitates an examination of the terms of the contract.

After some discussion during the argument it appeared that there was little, if any, material difference between the interpretations placed upon the contract by the learned counsel appearing for the plaintiffs and defendants ; and both argued the case on the assumption that the contract was an ordinary C. I. F. contract with this variation that the payment specified in the contract was not to be made as usual against the documents and was not to be made in this case until 48 days after the landing of the goods. That

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having regard to the special term of this contract it was not the duty of the defendants to hand over the documents relating to the goods as soon as the documents arrived but that they were entitled to retain them until the goods arrived, when it would be the duty of the defendants to hand over the documents to the plaintiffs for the purpose of taking delivery or for the defendants to take delivery themselves in the first instance and that payment would become due 48 days after the landing of the goods.

The question therefore arises what were the incidents of the defendants undertaking in such a contract. The variation of the terms as to the time of payment does not in my judgment alter the nature of the contract as a C. I. F. contract.

Taking the well-known incidents of such a contract, the defendants have *firstly* to ship at the port of shipment goods of the description contained in the contract *Secondly*, to procure a contract of affreightment under which the goods would be delivered in the Hooghly, *thirdly*, to arrange for an insurance upon the terms current in the trade which would be available for the benefit of the buyers, *fourthly*, to make out an invoice and *finally* to tender these documents and by reason of the special terms of this contract, to tender such documents upon the arrival of the goods.

It may be assumed for the purpose of this case that the goods were of the description contained in the contract and that a contract of affreightment was procured under which in ordinary circumstances the goods would have been delivered in the Hooghly and that a sufficient insurance was arranged.

But it was argued on behalf of the defendants that although the goods eventually arrived and were capable of physical delivery in the Hooghly they did not so arrive under the contract of affreightment procured by them in pursuance of their contract of 2nd February, 1914, with the plaintiffs: That the original contract of affreightment, of which the bill of lading was evidence came to an end as soon as war broke out, that though the goods were in fact carried by the "Steinturn" to the Hooghly, they were carried by her, after she had been condemned by the Prize Court in Ceylon and under an arrangement made in pursuance of an order of that Court, by which further freight and expenses became charged upon the cargo, and that inasmuch as the defendants could not deliver the goods under the original contract of affreightment the performance of their contract was impossible.

In my judgment this contention should be adopted: It was an implied part of the contract of 2nd February, 1914, that the

defendants should procure a contract of affreightment, *under which the goods would be delivered in the Hooghly*. That contract of affreightment was procured, and it was represented by the bill of lading in the name of the defendants.

But the operation of war on such a contract of affreightment made before, but which remained unexecuted at the time war was declared, made the further execution so far as the defendants, British subjects, were concerned unlawful, it being a contract with an alien enemy, and the contract of affreightment thereby became dissolved : *Esposito v. Bowden* (1).

Further the capture of the S. S. "Steinturm" prevented the delivery of the goods under the contract of affreightment procured by the defendants in pursuance of their contract with the plaintiffs, and the goods could only be delivered in the Hooghly by the payment of further freight and expenses which by the order of the Prize Court in Ceylon had become charged on the goods.

The bill of lading which under a C. I. F. contract is tendered by the seller to the buyer would be such as would procure delivery of the goods from the ship. In this case the bill of lading, if tendered by the defendants, would not by itself have enabled the plaintiffs to obtain delivery of the goods from the ship. Something more would have been necessary to enable the plaintiffs to get delivery, *viz.* the authority of the agents of the Crown which authority could only be obtained by the payment of the freight from Colombo to the Hooghly and certain other charges :

For these reasons it appears to me that the contract between the plaintiffs and the defendants included the performance of an act (*viz.* the procuring the contract of affreightment under which the goods would be delivered in the Hooghly) which after the contract was made became impossible by reason of the outbreak of war, within the meaning of section 56 of the Indian Contract Act and consequently the contract of 2nd February 1914 was void.

I think also that the procuring of the further execution of the contract of affreightment which was an implied part of the contract of 2nd February 1914, became unlawful by reason of an event which the defendants could not prevent *viz.* the outbreak of war and consequently the contract of 2nd February 1914, became void by reason of the provisions of section 56.

The learned counsel for the plaintiffs pressed us with the argument that the property in the goods had not passed to the plaintiffs, by reason of the fact that no appropriation of these goods, to which

(1) (1857) 7 E. & B. 763.

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the plaintiffs assented, to the contract in question had taken place until August or September, 1915, *i. e.*, after the capture and condemnation of the S. S. "Steinturm" and that the plaintiffs' contract therefore was not affected by the fact that the goods had been carried in a German vessel at the outbreak of war.

I do not think it is necessary to express any opinion on this point for in my judgment it is immaterial to the question whether the performance of an integral part of the contract between the plaintiffs and the defendants was rendered impossible or unlawful by the outbreak of war.

It was further argued that the contract of affreightment did not relate to the goods, the subject matter of the contract of 2nd February, 1914. This point, as far as I understand was not raised at the trial, and I think there can be no doubt that the contract of affreightment did, *in fact* relate to the goods, the subject matter of the contract.

But then it was said, even if that be so in point of fact, it cannot be said in law that the contract of affreightment was in pursuance of the contract between the plaintiffs and the defendants until something is done which binds the plaintiffs, such as assent by the plaintiffs.

Having regard to what I consider is the material question in this case, as intimated already, I cannot agree to the last proposition. I think the assent of the plaintiffs was immaterial and it was merely a question of fact whether the contract of affreightment did really relate to the subject matter of the contract of 2nd February 1914, and having regard to the date of the invoice, the description and quantities of the goods contained therein, there can be no doubt that in point of fact the contract of affreightment related to the subject matter of the contract of 2nd February, 1914.

As already stated the defendants did not take up the position now relied upon until the trial of the action, and the defendants on the 2nd January 1915 had called on the plaintiffs to take delivery. It was contended that the defendants by reason of such action were estopped from relying on the above-mentioned defence.

The plaintiffs were not able to point to any respect, in which they had altered their position by reason of the alleged representation of the defendants that they were in a position to give delivery in accordance with the contract, and I do not think that the defendants are estopped from taking the defence upon which they now rely. That defence, for the reasons given above, is, in my judgment, a good one, and therefore this appeal should be allowed, and judgment

entered for the defendants with costs in this Court and in the Court of First Instance.

Any extra costs necessitated by the amendment of the defence, or costs thrown away by reason thereof, to be paid by the defendants to the plaintiffs.

Money in Court to be paid out to the defendants.

**Mookerjee J.** This is an appeal by the defendants in a suit for damages for breach of contract. On the 2nd February, 1914, the defendants agreed to sell to the plaintiffs 150 tons basic steel bars to be shipped in June, July & August, 1914, in equal proportions. The terms of the contract were set out as follows in a letter addressed by the defendants to the plaintiffs.

"We beg to enter as having sold you, through broker P. N. Mukerji, 150 tons basic steel bars, with usual 10 percent 2nd class extras, at £5. 7s. 6d per ton, C.I.F. i.e., free Hooghly Shipment in three monthly lots, commencing June i.e., June, July, August 1914. Delivery to be completed within three days from the date of the landing of the goods. Terms, 45 days credit from the date of the delivery of the goods, failing which, due date will be calculated from the due date of the delivery i.e., three days from the landing of the goods. This sale is made on the basis of the existing terms and conditions in the contracts for this class of goods as are current in the market. Interest at the rate of 8 per cent per annum to be charged on any money unpaid after the due date, and rebate for payments before the due date will be allowed at the same rate. You have the option to have the goods weighed so as to arrive at the actual weighment, and in that case you shall have to notify us, so that we may make necessary arrangements to have our man present. But, in any case, claim for weighment will not be entertained, if made after three days after the arrival of the goods in your godowns from the jetty, and the invoice weight shall be accepted by you as the correct one. Please confirm."

On the 14th February, 1914, the plaintiffs supplied the specifications, and on the 19th February, the defendants sent out an order to the Beljo-Asiatic Trading Co. of Brussels for supply of the goods, which were partly of Belgian and partly of German manufacture. The June shipment was received by the defendants in due course and was delivered to the plaintiffs. We are now concerned with the July shipment. The goods were shipped from Antwerp on the 2nd July, 1914, in S. S. Steinturm, a German steamer which was on the high seas when war broke out between England and Germany

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on the 4th August, 1914. The ship was captured by the naval forces of His Majesty as an enemy ship, and was brought before the Ceylon Court of Admiralty. On the 25th August, 1914, the ship was condemned as lawful prize, but the cargo was released. On the 19th November 1914, the Prize Court ordered that in the event of the Crown conveying the cargo to destination, the Crown be authorised to recover against all cargo released and delivered at Calcutta, the following expenses, namely, Rs 15'50 in respect of freight per ton weight or measure, and such reasonable expenses as may be incurred in respect of agency charges. The Government of Ceylon took possession of the cargo on behalf of the Crown and Graham & Co. were employed to act as their agents. The goods arrived in Calcutta on the 2nd January, 1915, and the defendants took delivery on payment of freight and agency charges to Graham & Co. Meanwhile, the defendants had, on the 30th September 1914, intimated to the plaintiffs that they had received invoices for the goods (copies whereof were enclosed); no mention, however, was made of the seizure of the ship; indeed, there is nothing to show that either party was, at that date, aware of what had happened. On arrival of the goods in Calcutta, there was some controversy between the parties as to whether the plaintiffs or the defendants were liable to bear the charges imposed by the Prize Court. The plaintiffs denied their liability in this respect, with the result that the defendants disposed of the goods in the market. On the 18th March, 1915, the plaintiffs instituted the present action for recovery of Rs. 3,563-14-6p. as damages for failure of the defendants to deliver the goods in terms of the contract. The defendants resisted the claim substantially on the ground that the contract became void when war broke out on the 4th August, 1914. Mr. Justice Chaudhuri has overruled this contention and has given the plaintiffs a decree for damages which he has assessed at Rs. 2,500. On the present appeal, the defendants have reiterated the ground which they urged unsuccessfully in the Court below to enable them to escape from liability under the contract. The solution of the question raised clearly depends upon the nature of the contract and the effect thereon of well-established legal principles.

The agreement between the parties constitutes what is known as a C. I. F. or C. F. I. (cost, freight and insurance) contract, subject to an important variation. The rights and liabilities of the parties to a C. I. F. contract were formulated by Hamilton, J. in *Biddell Bros. v. Clemens Horst Co.* (1) in the following terms, which

(1) (1911) 1 K. B. 214.

were approved by Kennedy, L.J. in his celebrated dissentient judgment in the Court of Appeal [*Biddell Bros. v. Clemens Horst Co* (1)] which was upheld by the House of Lords and characterised by Lord Loreburn, L. C. as a remarkable judgment illuminating the whole field of controversy [*Clemens Horst & Co. v. Biddell Bros.* (2)]: "A seller under a contract of sale containing such terms has, *firstly*, to ship at the port of the shipment goods of the description contained in the contract; *secondly*, to procure a contract of affreightment under which the goods will be delivered at the destination contemplated by the contract; *thirdly*, to arrange for an insurance upon the terms current in the trade which will be available for the benefit of the buyer; *fourthly*, to make out an invoice as described by Blackburn J. in *Ireland v. Livingston* (3), or in some similar form; and, *finally*, to tender these documents to the buyer, so that he may know what freight he has to pay and obtain delivery of the goods, if they arrive, or recover for their loss if they are lost on the voyage. Such terms constitute an agreement that the delivery of the goods, provided they are in conformity with the contract, shall be delivery on board ship at the port of shipment. It follows that, against tender of these documents, the bill of lading, invoice and policy of insurance, which completes delivery in accordance with that agreement, the buyer must be ready and willing to pay the price." [See also *Houlder Bros. v. Public Works Commissioners* (4)]. In the case before us, there was this departure from the normal incidents of a C. I. F. contract that the payment was to be made, not against the document, but forty-eight days after the goods had been landed. It follows accordingly that the defendants were under no obligation to hand over the documents to the plaintiffs immediately on receipt thereof; they could tender the documents on arrival of the goods, or might take delivery themselves and make over the goods to the plaintiffs. The defendants argue that, in these circumstances, the contract became void on the 4th August 1914, inasmuch as, on that date, one essential element thereof, namely, the contract of affreightment became unlawful by reason of the outbreak of the war and consequently void. This contention raises the question of the effect of the outbreak of war on an executory contract made with an alien enemy before the war. Such a contract is avoided or dissolved by the outbreak of war, if it enures to the aid of the enemy: [*Furtado v. Rogers* (5)], or, if it is in its nature incapable of suspension

(1) (1911) 1 K. B. 934 (954).

(2) (1912) App. Cas. 18 (22).

(3) (1872) L. R. 5 H. L. 395 (406).

(4) (1908) App. Cas. 276 (290).

(5) (1802) 3 B. &amp; P. 191; 6 R. R. 752.

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[*Grismold v. Waddington* (1)]. A contract is deemed in its nature incapable of suspension if its proper performance necessitates intercourse with the enemy during the war [*Esposito v. Bowden* (2); *The William Bagaley* (3)], or where time is of the essence of the contract, or the parties cannot, on conclusion of peace, be made equal [*New York Life Insurance Co. v. Statham* (4); *Janson v. Driefontien Consolidated Mines* (5)]. The principle which underlies this doctrine is best stated in the words of Lord Tenterden quoted by Willes J. in *Esposito v. Bowden* (2). "Another general rule of law furnishes a dissolution of these contracts, (*i.e.*, for the carriage of goods in merchant ships) by matter extrinsic. If an agreement be made to do an act lawful at the time of such agreement, but afterwards, and before the performance of the act, the performance be rendered unlawful by the Government of the country, the agreement is absolutely dissolved. If, therefore, before the commencement of a voyage, war or hostilities should take place between the State to which the ship or cargo belongs and that to which they are destined, or commerce between them be wholly prohibited, the contract for conveyance is at an end, the merchant must unload his goods, and the owners find another employment for their ship; and probably the same principles would apply to the same events happening after the commencement and before the completion of the voyage." Chancellor Kent adopts the same conclusion for the reason that war making performance unlawful or impossible either before or after its commencement dissolves the contract of affreightment. "The contract of affreightment may be dissolved without execution, not only by the act of the parties, but, in many cases, by the act of the law. If the voyage becomes unlawful, or impossible to be performed, or if it be broken up, either before or after it has actually commenced, by war or interdiction of commerce with the place of destination, the contract is dissolved. There is no difference in principle between a complete interdiction of commerce, which prevents the entry of the vessel, or a partial one, in relation to the merchandise on board, which prevents it being landed. The contract of affreightment in respect to the goods is dissolved, for the shipper cannot demand the delivery of the goods if the landing of them would expose the vessel to seizure. And if the voyage be broken up by capture on the passage, so as to cause a complete

(1) (1818) 15 Johnson 57; 16 Johnson 438.

(2) (1857) 7 E. &amp; B. 763; 110 R. R. 822.

(3) (1860) 5 Wallace 397 (407).

(4) (1876) 93 U. S. 24.

(5) (1902) A. C. 484.



defeasance of the undertaking, the contract is dissolved notwithstanding a subsequent recapture." [Commentaries Vol. III page 248. See also Vol. I page 66. The contrary rule seems to have been formulated in the French Code de Commerce, sects. 276, 277]. This was recognised in *Avery v. Bowden* (1), which shows that a contract of affreightment may at once become void by the declaration of war. [See note to *Clemonston v. Blessig* (2)]. The doctrine that a contract entered into before war is dissolved by the outbreak of war, when its performance would involve "trading with the enemy", has been recognised in the recent cases of *Duncan, Fox & Co. v. Schrempff* (3); *Arnhold Karberg & Co. v. Blythe* (4) and *The Parchim* (5), and an instructive application is furnished by the decision in *Bekhor v. Haji Sultanali Shastary* (6), which further adopts the view taken in *Groom v. Barber* (7), that the seller is not bound, in a C. I. F. contract, to provide the purchaser with a policy covering war risks. The decision in *In re Weiss & Co.* (8) is not in conflict with the principle already enunciated, and is clearly distinguishable on the ground that the goods had been captured by the enemy before tender of the documents. I see no escape from the position, in the case before us, that the contract of affreightment was dissolved on the date of the outbreak of the war as the sellers could not thereafter insist on its performance by an alien enemy. In this view, the conclusion is inevitable that the contract for supply of goods also became void on that date.

The plaintiffs contend, however, that no question of the complete execution of the contract of affreightment properly arises in this case, inasmuch as the goods were in fact ultimately brought to their destination by S. S. Steinturm. This argument is obviously fallacious. The substance of the matter is that the goods were not and could not be carried to the port of destination under the original contract of affreightment. This is manifest from the proceedings in the Prize Court. The ship and cargo were seized, and although the ship alone was condemned while the cargo was released, the release was conditional on the payment of freight and charges as determined by the Prize Court. That the cargo was

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(1) (1855) 5 E. & B. 714; 103 R. R. 695. Affirmed in (1856) 6 E. & B. 953; 106 R. R. 882.

(2) (1855) 11 Exch. 135; 105 R. R. 451.

(3) (1915) 1 K. B. 365; (1915) 3 K. B. 353.

(4) (1915) 2 K. B. 386; (1916) 1 K. B. 495.

(5) (1915) 1 Trehern P. C. 579.

(6) (1915) 1 L. R. 40 Bom. 11.

(7) (1915) 1 K. B. 316.

(8) (1916) 1 K. B. 346.

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properly released is clear from the decision in *Re Rappenfels* (1), as the property in the cargo had, at the time of capture, vested in the consignees, British subjects [see the observations of Kennedy, L. J. in *Biddell Bros. v. Clemens Horst Co.* (2)]; but it is equally clear that the Prize Court and the Prize Court alone had jurisdiction to determine the question of freight and the conditions whereon the cargo should be released [*The Corsican Prince* (3)]. As explained by Sir Samuel Evans, the Prize Court deals with such claims in accordance with the Law of Nations and upon equitable principles freed from contracts, which almost always cease to have effect upon capture or seizure, by reason of the non-appearance or non-completion of the contract of affreightment; it may, indeed, discard the contract rate altogether even as a basis for assessment or calculation [*The Twilling Riget* (4)]. It is further indisputable that where the ship is condemned but the goods released, the Crown is entitled to impose the payment of freight as a condition of their release, and has a lien on them till it is paid: [*The Fortuna* (5); *The Diana* (6); *The Vrouw Anna Catharina* (7); *The Vrouw Henrietta* (8); *The Roland* (9); *The Parchim* (10)]. Consequently, the fact that the goods were brought to Calcutta ultimately by S. S. Steinturm is of no assistance to the plaintiffs; it was essentially a new voyage under new conditions; it was in no sense a continuation of the original voyage in fulfilment of the contract of affreightment; in the language of Chancellor Kent, that voyage was broken up by capture so as to cause a complete defeasance of the undertaking. The original bills of lading would be of no avail whatever, unless the consignee complied with the conditions imposed by the Prize Court; they would be useful for identification of the consignee in whose favour the Prize Court had decided to release the goods, but they had ceased to be operative legal documents, and delivery on their basis could not be claimed as a matter of right. I hold accordingly that the contract of affreightment and therewith the C. I. F. contract of sale became void on the 4th August, 1914. Consequently, the rights and liabilities of the parties thereafter must be determined with reference to the second paragraph of section 56

(1) (1914) L. L. R. 42 Calc. 334. (2) (1911) 1. K. B. 934 (956).

(3) (1916) P. 195; (1915) 1 Trehern P. C. 178.

(4) (1804) 5 C. Rob. 82; 1 E. P. C. 430.

(5) (1802) 4 C. Rob. 278; 1 E. P. C. 392.

(6) (1803) 5 C. Rob. 67; 1 E. P. C. 424.

(7) (1806) 6 C. Rob. 269; 1 E. P. C. 552.

(8) (1803) 5 C. Rob. 75; 1 E. P. C. 427.

(9) (1915) 1 Trehern P. C. 188.

(10) (1915) 1 Trehern P. C. 579.

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of the Indian Contract Act. That paragraph, so far as it applies to the present case, provides that a contract to do an act which after the contract is made, becomes unlawful by reason of some event which the promisor could not prevent, becomes void when the act becomes unlawful. As pointed out in *Karl Ettlinger v. Chagandas* (1), this provision deals with a case where the act to be done was, at the time the contract was made, lawful, but a legal prohibition has supervened before the performance of the contract. In such a case, the contract becomes void, and no question of damages for breach thereof arises. The plain language of section 56 thus renders unnecessary a discussion of the refined distinctions observed in English law in cases of impossibility of performance as illustrated by the recent decisions in *Horlock v. Beal* (2), and *Tamplin Steamship Co. v. Anglo-Mexican Petroleum Co.* (3).

From this standpoint, the correspondence between the parties as to the delivery of the goods is of no assistance to the plaintiffs. The defendants no doubt, at one stage, offered to deliver the goods to the plaintiffs on certain terms on the assumption that the contract was then in full operation. The proposed terms, however, were not accepted; there was thus no new agreement, nor did the principle of estoppel become applicable, as the plaintiffs are not shown to have altered their position in any manner by reliance on the conduct of the defendants. The claim of the plaintiffs is thus based on an alleged breach of an agreement which had become void long before the date when the breach is said to have taken place. In my opinion, such a claim cannot be sustained.

On these grounds, I agree that this appeal must be allowed and the suit dismissed with costs.

*Babu Debi Prasad Khaitan*—Attorney for the Appellants.

*Messrs. Fox and Mandal*—Attorneys for the Respondents.

A. T. M.

*Appeal allowed.*

(1) (1915) I. L. R. 40 Bom. 301.

(2) (1916) 1 A. C. 486.

(3) (1916) 2 App. Cas. 397.

## APPELLATE CIVIL.

*Before Sir John Woodroffe, Knight, Judge and Mr. Justice Beachcroft.*

ISWAR CHANDRA DEY AND OTHERS

v.

MURARI LAL DUTT AND OTHERS.\*

*Bengal Tenancy Act (VIII of 1885), Section 182—A raiyat holding a homestead as her own dwelling, effect of.*

A raiyat was in possession of an agricultural jote and paid rents for two years. Then she built herself a homestead and used it as her own dwelling and lived there :

*Held* that in the absence of any special custom or usage, section 182 of the Bengal Tenancy Act applies and she must be taken to be a raiyat as regards the homestead.

Appeal by the Defendants.

Suit for ejectment.

The material facts and arguments are set out in the judgment.

*Babu Jitendra Lal Banerjee* for the Appellants.

*Babus Ram Chandra Majumdar and Baranshibashi Mukerjee* for the Respondents.

The judgments of the Court were as follows :

**Woodroffe, J.**—This is a dispute over a small piece of land which is said to be about 45 feet square and is valued at Rs. 3. The suit is an action in ejectment and both the Courts have found in favour of the plaintiffs. A large number of defences of varying character have been taken which have all been decided against the present appellants.

Before us the main point which has been argued is this :—It has been found as a fact that the husband of the appellants' vendor died in the year 1897 or 1898; that he was in possession of an agricultural jote. It is found that his widow inherited this property and actually paid rent to the landlord for this jote for a period of two years. Then, in 1898 to 1899 she appears to have built herself a homestead, and according to the finding of the first Court, which has been confirmed in appeal by the lower appellate Court, she used this homestead as her own dwelling and lived there. This homestead, therefore, was acquired at a time when according to the finding of the Court she was a raiyat.

\* Appeal from Appellate decree No. 542 of 1915 against the decree of Babu Asutosh Banerjee, Subordinate Judge of Birbhum, dated the 15th of December 1914, affirming the decree of Babu Daibaki Lal Sen Gupta Munsiff, 2nd Court, at Rampurhat, dated the 23rd August, 1913.

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It has been contended, therefore, that in the absence of any special custom or usage which has not been proved, section 182 of the Bengal Tenancy Act, applies and that she must be taken to be a raiyat as regards this homestead. The lower appellate Court finds her to be a non-occupancy raiyat and that as such she had no right to transfer the land to the appellants, no custom having been proved which would entitle her to do so. Therefore no title passed to the appellant.

The main argument has been that, even accepting these facts, they are not sufficient to bring the case within the provisions of Bengal Tenancy Act, because it has not been shown that she was holding and inhabiting this homestead for agricultural purposes, or, in other words, that the homestead land was held ancillary to an agricultural purpose, in which case only it is contended that section 182 of the Bengal Tenancy Act would apply. I do not find in the numerous arguments addressed to the lower Court any reference to this particular point; but it would seem to me to be concluded by the findings of fact which we do find in the judgment, and to follow as a natural inference from these facts; and these facts are, as I have said, that the appellants' vendor's husband did possess this agricultural jote and she herself paid the rent for these two years and the allegation of abandonment has been held to be not proved. It is true that there is a finding in the judgment of the first Court that the appellants' vendor worked for sometime as a maid-servant. That however, would not in itself stand in the way of the fact that the homestead might also be held in connection with the agricultural land. Through a servant she might be cultivating lands; nor is the fact of payment of rent by the nephews sufficient. The lower appellate Court in its judgment says this:—"It is not in evidence under what arrangement they, that is, the vendor's nephews have been paying rent. Certainly the landlord did not enter upon the holding or let it out to another tenant. It might be that the Baishnabi made some arrangement under which they (the nephews) have been paying rent."

Under these circumstances I think that the concurrent findings in the judgments of the Courts below must be affirmed.

This appeal is therefore dismissed with costs.

Beachcroft, J.—I agree.

R. M. M.

*Appeal dismissed.*

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*Before Sir Lancelot Sanderson, Knight, Chief Justice and  
Sir Asutosh Mookerjee, Knight, Judge.*

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BANGSHI BADAN BISWAS AND ANOTHER

v.

KAMALA KANTA POROHIT.\*

*Suit, maintainability of—Land Registration Act (VII B. C. of 1876), Sec. 78—  
Estoppel—Rent, payment of.*

The plaintiff cannot evade the effect of section 78 of the Land Registration Act by recourse to the doctrine of estoppel.

The bar prescribed by section 78 of the Land Registration Act does not cease to be applicable, merely because the plaintiff establishes that the defendant has previously paid rent to him amicably, or because he brought the defendant upon the land. There is no question of estoppel, for the defendant does not dispute the title of the plaintiff; he relies only upon the statutory bar which places the plaintiff under disability.

Appeal by the Plaintiffs.

Suit for rent.

The primary Court dismissed the suit but the lower appellate Court decreed it. The defendant appealed to the High Court. The appeal was decreed by the following judgment of

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**Mullick, J.**—The plaintiffs sue for the rent of a holding in respect of the years 1269, 1271 and 1272 M. E. The schedules describing the lands of the holding have not been printed in the Paper Book, but I gather that the holding is situated within certain Noabad tenures described in schedule 2 and certain *lakhiraj* tenures and revenue paying estates described in schedule 1 of the plaint. The Munsiff dismissed the suit, but the Subordinate Judge decreed it and hence this second appeal by the defendants.

It appears that in 1909 both the Munsiff and the District Judge dismissed the plaintiffs' suit for the rent of the same holding for the years 1269 and 1270 on the ground that the plaintiffs had not registered their names as proprietors under Act VII B. C., 1876 in respect of the revenue paying estates and the *lakhiraj* tenures within which the holding is situated. In the present suit the plaintiffs claim under a different title. They are entirely silent in their plaint

\* Letters Patent Appeal No. 36 of 1915, against the judgment of Mr. Justice Mullick, dated the 2nd March, 1915, in Appeal from Appellate Decree No. 1112 of 1913, against the decree of Babu Jagan Mohan Sarkar, Subordinate Judge, 2nd Court, of Chittagong, dated the 21st December, 1912, reversing that of Babu Rajani Kumar Ghose, Munsiff, 2nd Court, of Patiya, dated the 4th December, 1911.

about the title previously alleged namely that they were proprietors by adverse possession. They now set up a *taluki* right held under one Ramesh Chandra Roy. With regard to the Noabad tenures which are *taluks* held under Government it is admitted that no registration under Act VII B. C., 1876 is necessary. There is no bar therefore against the plaintiffs in regard to the lands in schedule 2 of the plaint, but, in my opinion, there is a serious obstacle in regard to schedule 1. It is admitted that the defendants are auction-purchasers of the holding at a rent sale brought about in execution of a decree by plaintiff No. 1 acting as representative of the original landlord Uma. In the rent suit of 1909 the plaintiffs Nos. 1 and 2 as heirs of Uma founded their claim in respect of three of the properties on a proprietary title by adverse possession. The issues in that suit were:—1. Are the plaintiffs registered proprietors? If not, are they entitled to get a decree for rent?

2. Are they entitled to get rent of the plaint land? Although in a rent suit the question of title is not generally, directly and substantially in issue yet it would appear that in the suit of 1909 the parties by their pleadings made the question of title a matter not incidentally but substantially in issue. The defendants challenged the plaintiffs' right to receive rent on the ground that they were not registered proprietors and pleaded the statutory bar under section 78, Land Registration Act. The parties raised a further issue whether apart from their title as registered proprietors the plaintiffs were entitled to succeed. It was incumbent therefore upon the plaintiffs to prove their *taluki* right in that suit, and as they omitted to prove that right it is no longer open to them to prove it now. It is not alleged that it is a new right for the *Pottah* of 1911 executed after the decision of the suit of 1909 and alleged to have been granted by Ramesh Chandra Roy only confirms an ancient right; nor is it a case of mistake or ignorance of the *taluki* right on the part of the plaintiffs. In my opinion therefore the plaintiffs are barred by the rule of *Res Judicata*. It is true that the defendants cannot question their landlord's title, but the defendants are entitled to plead the statutory bar against their landlords as regards realisation of rent. Even therefore if my view as to *Res Judicata* is wrong the plaintiffs cannot succeed unless they can show in the present suit that they are not proprietors, but *talukdars*. The Munsiff has gone into the evidence in regard to *taluki* right and finds that it has not been established. He has dismissed the suit on the merits.

The learned Subordinate Judge expresses no opinion as to

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whether the *taluki* right has been established or not but appears to think that the defendants are bound to pay rent because they cannot question their landlords' title. This view, as I have already observed, is wrong. The learned Subordinate Judge also observes that the plaintiffs have realised rent on a previous occasion from the defendants. This is denied by the defendants and there does not seem to be any evidence for this finding.

The result is, that the plaintiffs are not entitled in the present suit to set up their *taluki* right and if they are entitled then they have failed to prove that right. Their suit must be dismissed with costs. The appeal is accordingly decreed with costs.

Against this judgment, the plaintiffs preferred an appeal under section 15 of the Letters Patent.

*Babu Khitis Chandra Sen* for the Appellants.

*Dr. Dwarka Nath Mitter* and *Babu Baikuntha Nath Mitter* for the Respondent.

The judgments of the Court were as follows :

*May, 24.*

**Sanderson, C. J.**—In my judgment this appeal must be dismissed. The question is whether the plaintiffs' suit is barred by the provisions of section 78 of the Land Registration Act. The learned Munsiff seems to have thought that this was an attempt on the part of the plaintiffs to get over the provisions of section 78 of the Land Registration Act and he thought that the plaintiffs did not succeed in so doing. Now, section 78 provides that "No person shall be bound to pay rent to any person claiming such rent as proprietor or manager of an estate or revenue-free property in respect of which he is required by this Act to cause his name to be registered, or as mortgagee, unless the name of such claimant shall have been registered under this Act." It appears that a previous suit was brought by the plaintiffs in which they alleged that they were owners of the property, basing their claim upon adverse possession; and, as I understand, they were then met by the provisions of section 78, and their suit was dismissed. Then they have brought this suit, and in this suit they claim as *talukdars* under the proprietor; in other words, they allege that they are not proprietors but *talukdars* under the proprietor, and so they want to get over the difficulty which presented itself in the previous suit, namely, section 78 of the Land Registration Act. In order to get over that difficulty the plaintiffs had to prove that they were *talukdars*. That matter was investigated by the Judge of the Court of first instance who came to the conclusion that they did not prove that they were *talukdars*,



and the result was that he dismissed the suit. Then the matter came before the first appellate Court, and the learned Judge did not arrive at any conclusion as to whether the plaintiffs were proprietors and therefore were affected by the provisions of section 78. He did not decide that question at all, but based his judgment on the ground that inasmuch as the plaintiffs claimed as *talukdars*, and the defendants had in fact, as he found, paid rent to the plaintiffs, the defendants were estopped from denying that the plaintiffs were the defendant's landlords, and that rent was due to them. With regard to that matter all I can say is that, if the plaintiffs were in fact proprietors and if section 78 did apply to them, then the allegation of estoppel based upon the payment of rent, could not affect the defendant's right to set up the defence that in spite of the payment of rent, section 78 would apply to the plaintiffs as proprietors. Therefore, I do not think that the judgment of the first appellate Court can be sustained.

The learned Judge in this Court apparently based his decision upon the defence that appears to be inevitable in most of these cases, namely, *res judicata*. That is the primary ground of his decision. He also found as follows, and I think that this was the true ground, "even therefore if my view as to *res-judicata* is wrong the plaintiffs cannot succeed unless they can show in the present suit that they are not proprietors, but *talukdars*. The Munsiff has gone into the evidence in regard to the *taluki* right and finds that it has not been established. He has dismissed the suit on the merits." The learned Judge relied upon that as the second ground for his judgment. In my opinion the second ground upon which he bases his judgment is the right one, and I think that this appeal should be dismissed with costs.

**Mookerjee, J.**—I agree. It is perfectly plain that the bar prescribed by section 78 of the Land Registration Act does not cease to be applicable, merely because the plaintiff establishes that the defendant has previously paid rent to him amicably, or because he brought the defendant upon the land. There is really no question of estoppel for the defendant does not dispute the title of the plaintiff; he relies only upon the statutory bar which places the plaintiff under a disability. Clearly, the plaintiff cannot evade the effect of section 78 of the Land Registration Act by recourse to the doctrine of estoppel.

A. T. M.

*Appeal dismissed.*

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*Before Sir Lancelot Sanderson, Knight, Chief Justice, and  
Sir Asutosh Mookerjee, Knight, Judge.*

NILMADHAB MAHAPATRA

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v.

SITANATH MAHAPATRA AND OTHERS.\*

*Rent—Payable partly in money and partly in kind—Contract—Market rate.*

A contract gave a right to a tenant to pay to his landlord rent partly in money and partly in paddy if he liked ; on the other hand, if he did not like to deliver paddy, he could pay the rent altogether in money, and the contract provided the rate in that case :

*Held*, that the rent was payable at the price mentioned in the contract and not at the market rate of paddy at the time the suit was instituted.

Appeal by Defendant No. 2.

Suit for rent.

The material facts are set forth in the judgment.

The Courts below held that the plaintiff was entitled to get the price of the paddy at the market rate. The decree was affirmed on second appeal by the following judgment of

N. Chatterjea, J.—This appeal arises out of a suit for rent, and the question involved in the appeal is whether the plaintiff is entitled to get the price of the paddy rent at the market rate, or at the rate mentioned in the *kabuliat*. The defendant agreed by the *kabuliat* to pay Rs. 8 in cash and 29½ maunds of paddy as rent, but there is a provision in it, that if he could not deliver the paddy, he was to pay cash at the rate of 1 maund 10 seers per rupee. Both the Courts below have held that plaintiff is entitled to get the price of the paddy at the market rate, and the defendant has appealed to this Court.

I am of opinion that the construction put upon the *kabuliat* by the Courts below is correct. There can be no doubt upon the terms of the document that a portion of the rent is to be paid in kind, *viz.*, 29½ maunds a year, on failure to pay the paddy at the time stated in the schedule of instalments interest at the rate of 10 seers per maund is to be paid, and the schedule of instalment expressly provides that the paddy is to be delivered in the month of Magh of each year.

\* Letters Patent Appeal No. 5 of 1913, against the decision of Mr. Justice N. Chatterjea, dated the 13th January, 1913, in Appeal from Appellate Decree No. 1643 of 1910, against the decree of J. N. Chakravarty Esq., Subordinate Judge of Bankura, dated the 4th February, 1910, affirming that of Babu Nagendra Nath Chatterjee, Munsiff of Khatra, dated the 18th March, 1909.

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It is true a money value is mentioned in the *kabuliat* for the paddy and the question is whether that in any way modifies the contract to deliver the paddy. In the body of the document it is stated that on failure to deliver paddy, its price at the rate of 1 maund 10 seers per rupee is to be paid. The price of the paddy at that rate would be Rs. 23-9-2 ps. In the schedule of instalments however the cash to be paid in lieu of paddy is Rs. 24. Now, what was the tenant to pay in cash on failure to deliver the paddy Rs. 23-9-2 ps. according to the rate mentioned in the body of the document or Rs. 24 as stated in the schedule. If the parties really agreed that a particular fixed sum was to be paid in lieu of the paddy, there would not have been this difference between the amount stated in the body of the document and the schedule. They therefore seem to have been stated in the *kabuliat* only for the purpose of fixing the stamp duty, and registration fee. The paddy rent provided by the *kabuliat* is no doubt a fixed one, but having regard to the terms of the *kabuliat* I do not think it was left to the tenant at his option either to deliver the paddy or to pay what might at a particular time be a very inadequate sum as the value of it.

The learned pleader for the appellant relied on the case of *Afer Morole v. Prosonno Kumar Ghose* (1), and on behalf of the respondent reliance was placed on the cases of *Baneswar Mukherji v. Umesh Chandra Chakrabarti* (2); *Akbar Ali v. Durga Kripa Sen* (3); and *Sheik Isaf v. Gopal Chunder Dey* (4). Each *kabuliat* however must be construed according to the particular terms contained therein, and upon the terms of the *kabuliat* before us, I think the Courts below have arrived at a proper construction. The appeal is accordingly dismissed with costs.

Against this decision, defendant No. 2 preferred an appeal under section 15 of the Letters Patent.

*Dr. Dwarka Nath Mitter* and *Babu Ram Dayal De* for the Appellant.

*Babu Probodh Kumar Das* for the Respondents.

The judgments of the Court were as follows :

**Sanderson, C. J.**—In this case the appeal is by one of the defendants, defendant No. 2, and the action was brought for rent; and, the sole matter in dispute is whether the rent in respect of the paddy is payable at the price which is mentioned in the contract

(1) (1910) 12 C. L. J. 649.

(2) (1910) L. L. R. 37 Calc. 626.

(3) (1900) 12 C. L. J. 589.

(4) (1910) 12 C. L. J. 593.

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or whether the plaintiff is entitled to get that rent at the market rate at the time the suit was instituted.

Now, but for the fact that three learned Judges have decided this matter in a way contrary to the one in which I am going to decide it, I really should not have wished to say any thing except that this appeal ought to be allowed. But out of deference to the learned Judges, I think it is necessary for me to say one or two words.

In my opinion, this matter must depend upon the construction of the contract, and the construction of the contract only; we have no right to make any speculation as to whether certain passages were entered in the contract for some motive which is not apparent on the contract itself; for instance, it has been said that this power to substitute a money payment for the delivery of paddy, and the mention of the 24 rupees have been put in for the purpose of registration. There is not a word about it in the contract and, if we were to act upon an assumption of this kind we would simply enter upon speculation. The contract, in my opinion, is too plain to need any explanation. It gives a right to the defendant to pay to the plaintiff rent partly in money and partly in paddy if he likes. On the other hand, if he does not like to deliver paddy, he can pay the rent altogether in money, and the contract provides the rate in that case. As I have said, if it were not for the fact that there has been a decision of no less than three learned Judges I should have said that the matter is too plain for argument.

This appeal, in my opinion, should succeed and the judgment of the three Courts should be set aside, and the decree will be altered in accordance with our judgment upon the basis that the annual rental payable is Rs. 24 instead of Rs. 59. The appellant is entitled to his costs in all the Courts.

**Mookerjee, J.**—I entirely agree.

A. T. M.

*L. P. Appeal allowed.*

## PRIVY COUNCIL.

PRESENT: *Viscount Haldane, Lord Atkinson, Sir John Edge and Mr. Ameer Ali.*

LACHHMAN PRASAD

v.

SARNAM SINGH AND OTHERS.

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April, 26.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE FOR THE NORTH-WESTERN PROVINCES, ALLAHABAD.]

*Hindu Law—Mitakshara—Joint property—Mortgage by head of joint family—Whether property can be made available to the extent of mortgagor's interest—Equity arising out of representation of authority.*

Where the property of a Hindu joint family is mortgaged by one of the members (save and except by the head of the family for antecedent debt or proven necessity of the joint family) the general law is that the mortgage is void and is not valid even to the extent of the mortgagor's interest.

It is possible that exceptions to this general rule may arise from special circumstances, e.g., from a representation or undertaking by the mortgagor that he had power to mortgage the joint property: but no special circumstances were held to exist in the present case.

*Mahabeer Persad v. Ramyad Singh* (1) discussed. *Madho Parshad v. Mehrban Singh* (2) referred to.

Appeal against a judgment and decree, dated the 11th December, 1912, of the High Court at Allahabad, affirming a judgment and decree, dated the 8th August, 1911, of the Court of the Subordinate Judge of Bareilly.

Sarnam Singh, Ratan Singh, and Kallu Singh, three Hindus subject to the Mitakshara law but separate in estate borrowed Rs. 1,200 from the appellant Lachman Prasad, and as security for the loan and interest thereon executed a bond, dated the 21st September, 1885, hypothecating their respective zamindari rights and interest in three villages.

The mortgagors or their sons paid from time to time several amounts on account of the principal and interest or either of them. The last of such payments was on the 1st June, 1903. Ratan and Kallu died long before the institution of the present suit.

On the 21st May, 1910, Lachman, the mortgagee, instituted the suit giving rise to this appeal. The defendants were Sarnam Singh (defendant 1), the surviving mortgagor, and his son and

(1) (1873) 12 B. L. R. 90.

(2) (1890) L. R. 17 I. A. 194; I. L. R. 18 Calc. 157.

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grandson and the sons and grandsons of the other two deceased mortgagors. The object of the suit was to enforce the mortgage.

The sons and grandsons of the mortgagors contended that the mortgage was of the joint family property, and was, therefore, not binding on them as it was not given for legal necessity or an antecedent debt of their father or grandfather.

The Subordinate Judge dismissed the suit with costs. He held on the authority of a Full Bench decision of the Allahabad High Court in the case of *Chandradeo Singh v. Mata Prasad* (1), that the bond in suit would be binding on the sons and grandsons provided the plaintiff could prove that the loan was obtained for family necessity or to meet an antecedent debt, and that the plaintiff failed to prove that there was any family necessity for the loan which was not raised to meet an antecedent debt, and consequently the bond in suit was not binding on the sons and grandsons; as to the liability of Sarnam, one of the original mortgagors the Subordinate Judge was of opinion that the question would only arise when an application, under order 34, rule 6 of the Code of Civil Procedure, is made.

The High Court (Richards, C. J., and Banerji J.) dismissed the plaintiff's appeal by a judgment, of which the following is the material part:—

"It is admitted that the property mortgaged was joint family property. We agree with the Court below that the plaintiff failed to prove that the mortgage was made for family necessity. Assuming, therefore, that onus of proving necessity lay upon the plaintiff, the suit was properly dismissed. The question whether or not the onus of proving family necessity lies upon a person taking a mortgage of joint family property has been recently considered by a Full Bench of this Court in the case of *Chandradeo Singh and others v. Mata Prasad and others* (1). In that case the majority of the Court held that the onus lay upon the mortgagee. We feel bound by this decision, and must hold that the Court below was right in dismissing the plaintiff's claim. Following the above ruling it was held in *Kali Shankar v. Nawab Singh* (2), that a member of a joint Hindu family, governed by the Mitakshara, cannot validly mortgage his undivided share in ancestral property held in coparcenary on his own private account without the consent of the co-sharers, and that consequently even his interest in the family property cannot be sold in enforcement of a mortgage which is not proved to have

(1) (1909) L. L. R. 31 All. 176.

(2) (1909) L. L. R. 31 All. 507.

been made for family necessity. We accordingly dismiss the appeal with costs including in this Court fees on the higher scale."

The plaintiff thereupon appealed to His Majesty in Council.

*J. M. Parikh* and *J. K. Roy*, for the Appellant.

Respondents did not appear at the hearing.

*J. M. Parikh* for the Appellant: The recent judgment of the Board in *Sahu Ram Chandra v. Bhup Singh* (1), precludes me from questioning the principle of *Chandraseo Singh v. Mata Prasad* (2), but I submit that relief can be granted in equity against the mortgagor's share: *Mahabeer Persad v. Ramiyad Singh* (3).

(Viscount Haldane: That case was decided on the ground that the father and the eldest son had in effect made a misrepresentation which they had to make good. Here there are no such special circumstances as to create an estoppel).

There is nothing in the report to show that there was any evidence of any representation in the case. The judgment is based on the fact that the mortgage was given and the learned judges held that the mere fact of giving such a mortgage was representation. I submit therefore, that there was representation in this case also. That case is discussed by this Board in *Madho Parshad v. Mehrban Singh* (4), where it was said that the Judges deciding it justly considered that it was contrary to equity and good conscience that the mortgagors should keep the security as well as the money.

The mortgage here is voidable only, not void. If the sons and grandsons of the mortgagors had not disputed it, the plaintiff would have got a decree. When it was disputed the surviving mortgagor could have declared in unequivocal terms that he would have his share in the mortgaged properties separated and thus make it available.

In equity he should be taken to have his share so partitioned, and a decree could be given to the plaintiff in respect of that share only.

The judgment of their Lordships was delivered by

**Viscount Haldane:**—In this case no difficult question of law arises, and their Lordships are prepared to intimate at once the advice which they will tender to His Majesty upon the appeal.

It is a suit with regard to a mortgage made on the 21st September, 1885, by three Hindus subject to the Mitakshara law, who

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(1) (1917) 26 C. L. J. 1.

(3) (1873) 12 B. L. R. 90.

(2) (1909) I. L. R. 31 All. 176.

(4) (1890) L. R. 17 L. A. 194 (196, 198); I. L. R. 18 Calc. 157.

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joined in borrowing 1,200 rupees on the security of the property of the joint family of which they were the heads. There is nothing special in the terms of the mortgage, which do not go beyond what is stated. It is contended that although, according to the decisions of this Board, that mortgage is *prima facie* invalid, as being for neither an antecedent debt nor for any proven necessity of the joint family, it still may be held to be valid on the doctrine laid down by the High Court of Calcutta in the case of *Mahabeser Persad v. Ramyad Singh* (1). There, the head of a joint family and his son, who was of age, united in attempting to raise money. There was a younger son, also a member of the joint family, who was not of age and who did not, and could not, concur. The mortgage was declared bad, but the learned judges who decided the case thought themselves at liberty to put a condition into the decree which in effect determined that an implied representation or undertaking given by the mortgagors that they had power to charge the joint family property, and would make good the representation by partition or otherwise, should receive effect, and accordingly they, in substance, ordered by their decree a partition of the property so that the separate shares to be obtained under the partition of the father and the son should be made payable to the mortgagees. Whether that particular case was rightly decided or not, it is not necessary to consider here, because the learned Judges proceeded upon the footing that there had been the representation referred to. On looking at the facts, their Lordships agree with the observation of Mr. Parikh that there was very little, if any, evidence of such a representation, but that there was such a representation was the basis of the judgment, and, unless the learned Judges had held that an equity arose out of it, their judgment would have amounted to this, that for every mortgage by the head of a joint family the property of the joint family could be made available to the extent of the interest of the mortgagor. Now, whatever may happen where there are special circumstances such as there were in the case referred to, that is not the general law. The general law is quite plainly laid down by Lord Watson in delivering the judgment of this Board in the case of *Madho Parshad v. Mehrban Singh* (2) where he says, at p. 196, this :—

"Any one of several members of a joint family is entitled to require partition of ancestral property, and his demand to that effect, if it be not complied with, can be enforced by legal process. So long

(1) (1873) 12 B. L. R. 90.

(2) (1890) L. R. 17 I. A. 194.



as his interest is indefinite, he is not in a position to dispose of it at his own hand and for his own purposes ; but as soon as partition is made, he becomes the sole owner of his share, and has the same powers of disposal as if it had been his acquired property. The actual partition is not in all cases essential. An agreement by members of an undivided family to hold the joint property individually in definite shares, or the attachment of a member's undivided share in execution of a decree at the instance of his creditor, will be regarded as sufficient to support the alienation of a member's interest in the estate or a sale under the execution."

Now these are the principles which govern this and all other cases of the kind, and, according to these principles, there can be no doubt that the present mortgage is void. There were no such special circumstances as the learned Judges seem to find in the first case above quoted entitling them to impose terms upon the defendants, whether Lord Watson approved that case or not, which is not quite clear, he at all events said that it had no application which would affect the operation of the principles which he laid down as above quoted.

The result is that the mortgage in the present case is bad and the appeal fails, and their Lordships will humbly advise His Majesty that it should be dismissed with such costs as the respondents, not having appeared before this Board, may be entitled to.

*E. Dalgado* :—Solicitor for the Appellant.

*Pyke, Franklin & Gould* :—Solicitors for the Respondents.

J. M. P.

*Appeal dismissed.*

PRESENT :—*Viscount Haldane, Lord Atkinson, Sir John Edge,  
Mr. Ameer Ali and Sir Walter Phillimore.*

KAWAL NAIN AND OTHERS

*v.*

BUDH SINGH AND OTHERS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE FOR THE  
NORTH-WESTERN PROVINCES, ALLAHABAD.]

*Hindu Law—Mitakshara—Joint family—Partition—Suit for partition dismissed  
though right to partition admitted—Whether status remains joint or several.*

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*Lachman*

*v.*

*Sarnam.*

*Viscount Haldane.*

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The institution of a suit for partition by a member of a Hindu joint family subject to the Mitakshara law claiming his share of the family property, amounts to an intimation to his co-sharers, the defendants, of an unequivocal desire on the part of the plaintiff for separation from the joint family; and the commencement of such a suit effects the plaintiff's separation from the joint family.

A member of a Hindu joint family instituted a suit for partition. The suit was dismissed on the ground that though he had a legal right to partition, he had in the Judge's opinion no proper motive for exercising that right. Thereafter he mortgaged his share, and on the mortgagee suing claimed to be still joint:

*Held*, that notwithstanding the judgment the mortgagor had become separate from the date of his suit and that the mortgage of his share was valid.

*Girja Bai v. Sadashiv Dhundiraj* (1) followed.

*Ex parte* Appeal from a decree of the Allahabad High Court, dated April 10, 1913, reversing a decree of the Subordinate Judge of Saharanpur, dated August 31, 1911.

The facts of the case are sufficiently set out in their Lordships' judgment. It may be added that the suit for partition filed by Prabhu Lal was not only instituted but dismissed before the mortgage, which was in fact intended to provide funds for an appeal. Such appeal was not however, proceeded with, a compromise being effected, under which Prabhu Lal did in fact become separate. When the present suit was brought on the mortgage, Prabhu and the other members of the family who were joined "as a precautionary measure," set up that they were joint and the mortgage invalid. The Subordinate Judge decreed the suit, but the High Court (Richards, C. J. and Banerji, J.) dismissed it on the ground that at the date of the dismissal of the suit for partition the mortgagor was joint. The mortgagees then appealed to His Majesty in Council.

*De Gruyther K. C.* and *Dube* for Appellants: The only question is whether the mortgagor was joint or separate when he executed the mortgage. It is submitted that from the date of instituting his suit for partition the mortgagor was separate: *Girja Bai v. Sadashiv Dhundiraj* (1) (which was decided subsequent to the High Court judgment under appeal). It is immaterial that by an erroneous judgment the suit for partition was dismissed: the filing of that suit was an unequivocal intimation of plaintiff's desire to separate and he became separate from April 6, 1889. The Subordinate Judge in dismissing the partition suit said "It appears that the plaintiff is now thinking of wasting the family property, and having found no other means he has instituted this suit without their being any actual cause of action. I must admit that the plaintiff

(1) (1916) L. R. 43 I. A. 151; L. L. R. 43 Calc. 1031; 24 C. L. J. 207.

has certainly a share in the joint ancestral property equal to that of his father, and he can also get the property partitioned under the Hindu Law: but this admission does not warrant the institution of a suit in Court without the accrual of any cause of action."

The Subordinate Judge admitted that Prabhu had one-fifth share and could get the property partitioned under Hindu Law. He does not say that Prabhu did not unequivocally express his intention to separate. Prabhu's filing the suit was an unequivocal intimation. The High Court went wrong by regarding the question as being whether actual physical partition had taken place. They had not this Board's judgment before them.

(Sir W. Phillimore: They do not seem to have applied their minds to the question whether separation can be effected by Volition).

The Respondents did not appear.

Their Lordships' judgment was delivered by

**Viscount Haldane**:—This is an appeal from a judgment of the High Court at Allahabad which reversed a judgment of the Subordinate Judge of Saharanpur. The question which arose was whether a mortgage of certain interests in land was valid, as contended by the appellants, who were the successors in title of the original mortgagee. The land had been the property of a joint family subject to Mitakshara law, and the controversy turned on whether the respondent Prabhu Lal, the mortgagor, had separated from the joint family before executing the deed, and so rendered himself competent to make a valid hypothecation of the interest which had come to him as a member of the joint family.

Prior to the mortgage, which was dated the 28th August, 1890, the respondent Prabhu Lal had, on the 6th April, 1889, commenced a suit for partition. By his plaint he had claimed a fifth share of the family property, and their Lordships entertain no doubt that the claim amounted to an intimation to the defendants, his co-sharers, of the unequivocal desire of the plaintiff for separation from the joint family. If this be so the judgment of the Judicial Committee in the recent case of *Girja Bai v. Sadashiv Dhundiraj* (1) renders it beyond question that the commencement of this suit for partition effected a separation from the joint family. It is immaterial, in such a case, whether the co-sharers assent. A decree may be necessary for working out the

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result of the severance and for allotting definite shares, but the status of the plaintiff as separate in estate is brought about by his assertion of his right to separate, whether he obtains a consequential judgment or not.

These considerations are sufficient to dispose of the only serious question raised by the present appeal. Had their Lordships' judgment in the case just referred to been delivered before and not after the judgments now under review, that of the High Court would probably have been different. The Subordinate Judge thought himself bound to examine a number of transactions from which he drew the inference that the members of the joint family had assented to the severance contended for, although a complete partition had not been carried out. It was not necessary for him to find so much in order to establish the severance, but the result at which he arrived was right. The High Court, in reversing his decision, proceeded on the footing that no agreement for severance had been established, and that it was necessary that the existence of such an agreement should be shown. This is plainly contrary to the principle as subsequently laid down by this Board in the other case. It has been argued that the suit for partition, commenced by the plaintiff of 1890, was dismissed and that the plaintiff was therefore of no effect. Their Lordships cannot assent to this argument. It is true that in the suit of 1890 the Subordinate Judge dismissed the claim disbelieving the case put forward in support of it, namely, that the father, who was head of the joint family, had refused to supply his son Prabhu Lal with the funds required to maintain him, and had otherwise ill-treated him. The High Court says that, while this disbelief was no valid ground for dismissing a claim for partition, it still shows that on the date when the suit was dismissed the family remained joint. It will, however, be observed that the judgment in that suit proceeded on the ground that owing to the age of the father he might have other children and that in consequence the property could not be divided or the plaintiff's share fixed. But, while this was obviously wrong, the judgment on its face concedes that the plaintiff had a right to partition, although no cause of action for an actual partition was regarded as having accrued. It cannot be said that the plaintiff did not amount to such an expression of intention as to satisfy the conditions of the law as now settled.

Their Lordships have thought it necessary to examine the argument for the appellants in the present appeal with the more care because the respondents have not been represented at the Bar. But

they are satisfied that the High Court has given a decision which cannot stand. They will therefore humbly advise His Majesty that this appeal should be allowed and the decree of the Subordinate Judge restored. The respondents must pay the costs here and below. But their Lordships desire to point out that as the personal remedy under the mortgage is probably barred by limitation, the liberty to apply for a personal decree, which is given by the decree in accordance with order 34 of the Code of Civil Procedure and section 90 of the Transfer of Property Act in the event of the proceeds of a sale proving insufficient, must be subject to the right of the respondents to raise any such defence to the personal claim, such as one based on limitation, which may prove open to them.

*Barrow, Rogers and Nevill* :—Solicitors for the Appellants

The Respondents did not appear.

J. M. P.

*Appeal allowed.*

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## APPELLATE CIVIL.

*Before Sir Lancelot Sanderson, Knight, Chief Justice, and Sir Asutosh Mookerjee, Knight, Judge.*

SHEIKH YAKUB AND ANOTHER

v.

TAZIMUDDI MULLICK AND OTHERS.\*

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*May, 31.*

*Second appeal—Civil Procedure Code (Act V of 1908) Sec. 102—Declaratory suit—Mesne profits, claim for—Mesne profits valued less than Rs. 100—Technicalities.*

A second appeal lies against a decree for *mesne profits* valued less than Rs. 500 in a suit in which the claim *inter alia* was for a declaration of title; section 102 of the Code of Civil Procedure is no bar in such a case.

A Court is not bound by any technicalities with regard to the form of the statement of claim.

Appeal by the plaintiffs.

\* Letters Patent Appeal No. 21 of 1915, against the judgment of Mr. Justice Mullick, dated the 28th January 1915, in Appeal from Appellate Decree No. 3634 of 1910, against the decree of Babu Behari Lal Chatterjee, officiating Additional Subordinate Judge of Faridpur, modifying the decree of Babu Jnan Chandra Banerjee, Munsiff, 1st Court, at Bhanga, dated the 5th August, 1909.

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Suit for declaration of title, for confirmation of possession and for mesne profits, which were assessed at Rs. 49-8 as.

The defence was that the land belonged originally to the jote of the plaintiffs but had been given to the predecessor of the defendants in exchange for another plot. The primary Court decreed the suit. The lower appellate Court set aside the decree so far as it related to mesne profits but confirmed it so far as it related to declaration of title and possession. The plaintiffs preferred a second appeal as regards mesne profits. The defendants also appealed. Both the appeals were dismissed by the following judgment of

1915.

January, 28.

Mullick, J.—The Munsiff decreed the plaintiffs' suit for declaration of title, for confirmation of possession and for mesne profits in respect of the year 1907 which were assessed at Rs. 49-8 as. The defence was that the land belonged originally to the *jote* of the plaintiffs but had been given to the predecessor of the defendants in exchange for another plot. This defence was disbelieved. On appeal the learned Subordinate Judge set aside the decree so far as it related to mesne profits but confirmed it so far as it related to declaration of title and possession.

S. A. No. 3634 of 1910 is preferred by the plaintiffs on the ground that the learned Subordinate Judge should have decreed mesne profits as well. The claim for mesne profits is put in this way. It is said that in 1907 the defendants sued the plaintiffs in the Small Cause Court alleging that the plaintiffs had cut crops grown on the land and claiming as the value of these crops the sum of Rs. 49-8 as.; that suit was decreed. Therefore it is maintained that the plaintiffs are entitled in the present suit to the amount which they paid into Court in order to satisfy that Small Cause Court decree. In the face of the plaint, however, in the present suit, the claim for mesne profits cannot lie. The suit is professedly one for confirmation of possession. But I am asked by the learned vakil for the appellants in Appeal No. 3634 to read into the plaint the allegation that the plaintiffs were dispossessed in 1907 and that somehow or other they resumed possession in 1908. It is impossible to read this allegation into the plaint when the plaint itself is distinctly one for confirmation of possession. It is not sufficient to say that pleadings in this country are to be liberally construed and that the Courts should give reliefs not so much upon the plaint as upon the facts proved.

In the next place even if the plaint were construed in the manner in which the plaintiffs ask, there is no second appeal in respect of the amount disallowed; for the amount is below Rs. 100

and under section 102 of the Code of Civil Procedure a second appeal does not lie.

Some attempt has been made to distinguish between a claim for mesne profits as an ascertained sum and a claim to be determined upon an account. But the case of *Kunjo Behary Singh v. Madhub Chundra Ghose* (1) is clear authority for holding that when the amount of mesne profits decreed is less than Rs. 500 no second appeal lies. Appeal No. 3634 of 1910 is therefore dismissed with costs.

I now come to Appeal No. 3771 of 1910 in which the defendants attack the decree so far as it relates to the declaration of title and confirmation of possession.

The first point urged in this appeal is that the lower appellate Court has wrongly rejected certain survey papers filed before the settlement officer. But there is nothing to show that these papers were ever tendered before the Munsiff nor that this alleged rejection of evidence was ever made a ground of appeal before the Subordinate Judge.

It is next argued that the Court of appeal below has arrived at its finding by wrongly placing the onus upon the defendants. It appears however, from the perusal of the judgment of the Munsiff and the judgment of the Subordinate Judge which is a judgment of affirmance that the evidence on both sides was considered and that the finding was arrived at upon the balance of evidence. The Munsiff in his judgment after dealing with the evidence of the defendants deals with the evidence of the plaintiffs and finds clearly that the plaintiffs were in possession of the disputed lands in the manner and at the time alleged. The learned Subordinate Judge accepts this finding and there is nothing to support the contention that he wrongly placed the onus upon the defendants. There is, therefore, no substance in the grounds urged by the vakils for the appellants and the result is that this appeal is also dismissed.

Against this judgment, the plaintiffs preferred an appeal under section 15 of the Letters Patent.

*Babu Rupendra Kumar Mitter* for the Appellants.

*Babu Jnanendra Nath Sircar* for the Respondents.

The judgments of the Court were as follows :

**Sanderson, C. J.**—In this case the suit was brought by the plaintiffs asking for a declaration of their title, and also that their possession should be confirmed, and further that a decree might

(1) (1896) I. L. R. 23 Calc. 884.

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be passed in their favour for a sum of Rs. 49-8 annas by way of mesne-profits: and, then the plaintiffs went on and claimed 'in the alternative that if for any reason the Court adjudged the plaintiffs to be dispossessed, or not in possession after the institution of the suit, a decree might be passed for *khas* possession; and, finally they prayed for any relief which the Court might find them entitled to according to the principles of equity.

In my judgment the rights of the parties in this case are plain: It appears that the Courts in this case have decreed the plaintiffs' title, and there is no dispute about that matter. The present defendants in the year 1907 brought an action against the plaintiffs on the ground that the present plaintiffs had taken away the crops which the defendants had grown. That action was brought in the Small Cause Court and the present defendants obtained a decree for a sum of Rs. 43-8 annas, on the ground that the present plaintiffs had deprived the present defendants of the crops in question. Then the present plaintiffs brought this suit in the following year.

The learned Judge of this Court has held that inasmuch as the claim was not for possession but was for confirmation of possession, the amount of mesne profits which the first Court had awarded namely Rs. 49-8 annas could not be decreed. I may here say that the sum of Rs. 49-8 as. was made up of the Rs. 43-8 annas, and I suppose interest from the time it was paid until the institution of this suit.

Now, my first observation about that part of the learned Judge's judgment is that there was in the suit an alternative claim for possession, and therefore, it cannot be said that the plaintiffs' claim was confined to confirmation of possession. But, in my judgment, when we look at the facts of the case, we find that the plaintiffs claimed Rs. 49-8 annas as mesne profits, and their claim to that must have been based upon the allegation that the defendants had been in possession during the year 1907, and had been growing crops on the land and had received the value of the crops, namely Rs. 43-8 annas and had not paid any rent to the plaintiffs. That is really the gist of the case; and, I think it would be wrong for us to be bound by any technicalities with regard to the form of the statement of claim, even if the plaintiffs were debarred by the form of the statement of claim, which I think they are not.

The learned Judge went on to say that there was no second appeal in this case, because section 102 of the Civil Procedure Code provided that in such a case there would be no second appeal. As has already been pointed out by my learned brother Mr. Justice



Mookerjee during the course of the argument, with great respect to the learned Judge, there is really nothing in that point. That section says, "No second appeal shall lie in any suit of the nature cognizable by Courts of Small Causes, when the amount or value of the subject matter of the original suit does not exceed five hundred rupees." This was a suit in which the claim was, amongst other things, for a declaration of title and being a suit for a declaration of title, it could not be brought in the Small Cause Court. Therefore section 102 has no application to it.

For these reasons I think that this appeal should be allowed, and the decree of the Court of first instance restored that is to say, the plaintiffs' title to the disputed land should be declared and his possession of it should be confirmed, and a decree for the amount of Rs. 49-8 annas should be awarded to them.

The plaintiffs are entitled to their costs in all the Courts including the costs of this appeal.

Mookerjee, J.—I agree.

A. T. M.

*Appeal allowed.*

*Before Sir Asutosh Mookerjee, Knight, Judge, and  
Mr. Justice Cuming.*

BINDU BASHINI DASIA

*v.*

KESHAB LAL BOSE AND ANOTHER.\*

*Decree, execution of—Order made in execution proceedings—Limitation—Entries in order-sheet—Burden of proof.*

An order made at one stage of execution proceedings cannot be questioned at a late stage, unless the parties sought to be bound by such order had no notice of the proceedings.

*Maassam v. Sarat Coomari* (1); *Monmohan v. Dwarka Nath* (2) and *Mockai v. Meseruddin* (3) referred to.

\* Appeal from Appellate Order No. 27 of 1916, against an order of Babu Sarat Kisore Bose, Subordinate Judge of Jessore, dated the 17th September, 1915, affirming that of Babu Susil Chandra Mitra, Munsiff of Jessore, dated the 12th December, 1914.

(1) (1909) 11 C. L. J. 357.

(2) (1910) 12 C. L. J. 312.

(3) (1910) 13 C. L. J. 26.

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When an order for attachment was made after service of notice on the judgment-debtor under rule 22, Order 21 of the Code of Civil Procedure and was followed by service of the writ of attachment, to entitle the judgment-debtor to escape from the operation of the order, he must establish that the order was made without notice to him.

The party who contends that the entries in the order-sheet do not correctly state the events that have taken place, must start his case. The position is different where the entry affects a person who is not a party to the proceeding.

*Mir Tapurah v. Gopi Narayan* (1); *Radhay Koer v. Ajedhya* (2); *Ananda v. Daijie* (3) and *Mohiuddin v. Pirthichand* (4) explained.

Appeal by Decree-holder.

Application for execution of decree.

The material facts and arguments appear from the judgment.

*Mr. B. K. Lahiri* and *Babu Khetra Mohan Ghose* for the Appellant.

*Babus Sarat Chunder Roy Chowdhury* and *Satya Charan Sinha* for the Respondents.

The judgment of the Court was delivered by

August, 18.

**Mookerjee, J.**—This appeal is directed against an order of dismissal of an application for execution of a decree. The decree was made on the 5th November, 1906. The first application for execution was made on the 12th October, 1909. Notice under order 21 rule 22 was directed to issue, as more than a year had elapsed from the date of the decree. There is an entry in the order-sheet of return of service, which states that notice was served duly. But, on the 15th December, 1909, the application was dismissed for default, as neither the decree-holder nor the judgment-debtor was present. The second application for execution was made on the 15th July, 1911. Notice was directed to issue on the judgment-debtors under order 21 rule 22. The entry in the order-sheet made on the 7th August, 1911, recites that the notice had been duly served. On the 21st August, 1911, the Court directed a writ of attachment to issue in respect of the immovable properties of the judgment-debtors. There is an entry in the order-sheet that the writ had been served in due course. This was followed by an order for proclamation of sale. But the proclamation was not published and the case was again dismissed for default on the 16th January, 1912. The present application for execution was made

(1) (1907) 7 C. L. J. 251.

(2) (1907) 7 C. L. J. 262.

(3) (1909) 10 C. L. J. 189; I. L. R. 36 Calc. 726.

(4) (1914) 19 C. W. N. 1159.

on the 24th January, 1913. The judgment-debtors entered appearance and contended that the application was barred by limitation. The Courts below have given effect to this objection and have dismissed the application. They have found that the application for execution made on the 12th October, 1909, was defective in substance, that time was accordingly given to the decree-holder to amend and refile the application within five days, that the application was not refiled within the time allowed, and, that, even when refiled on the 20th November, 1909, without leave obtained for extension of time, it was defective in material particulars. On these grounds, the Courts have held that the application of the 12th October, 1909, was not in accordance with law to the proper Court to take a step in aid of execution, that the subsequent application for execution, made on the 10th July, 1911 was consequently of no avail to the decree-holder, and that the present application was thus clearly barred by limitation. Neither of the Courts below, however, has examined in detail the proceedings on the basis of the second application for execution, and, this omission, has, in our opinion, led to an error of law which vitiates their concurrent decision.

An examination of the order-sheet in the proceedings on the basis of the second application discloses that on the 21st August, 1911, the Court directed a writ of attachment to issue. This was in substance a determination that the decree was on that date alive and capable of execution. So long as that determination stands, it is impossible for the judgment-debtors to contend that the present application is barred by limitation: *Mungul Pershad Dicit v. Grija Kant Lahiri* (1). The order for attachment was, if the entries in the ordersheet are reliable, made after service of notice on the judgment-debtors under rule 22 of order 21 of the Code, and was followed by service of the writ of attachment. Consequently, to entitle the judgment-debtors to escape from the operation of the order of the 21st August, 1911, they must establish that the order was made without notice to them. The principle applicable to cases of this character as deducible from a long line of cases, [*Maazzam Hussien v. Sarat Coomary Debi* (2); *Monmohan v. Dwarka Nath* (3) and *Mochai Mandal v. Meseruddin Mollah* (4),] is that an order made at one stage of execution proceedings cannot be questioned at a later stage, unless the parties sought to be bound by such order had no notice of the proceedings. Cases are by no means rare

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(1) (1881) I. L. R. 8 Calc. 51; L. R. 8 I. A. 123; 11 C. L. R. 113.

(2) (1909) 11 C. L. J. 357.

(3) (1910) 12 C. L. J. 312.

(4) (1910) 13 C. L. J. 26.

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where orders have been obtained in execution proceedings without service of notice on the judgment-debtor, who has subsequently succeeded, on proof of non-service of notice upon him, to escape from the effect of such *ex parte* order. Reference may in this connection be made to *Sheik Budan v. Ramchandra* (1), *Narayana v. Gopalakrishna* (2) and *Ramasami v. Ramasami* (3). This point of view does not appear to have been fully realised in either of the Courts below; as a result, the judgment-debtors have been allowed to attack the validity of the proceeding on the first application, regardless of what had taken place on the second application. But before they could reach that stage, they were bound to attack the order of the 21st August 1911, and to establish that it was not operative against them because made without previous service of notice. The judgment-debtors, however, have contended here that the burden lies upon the decree-holder to establish that the order in question is conclusive, because made after service of notice on them. In our opinion, this position is absolutely untenable. There is no presumption that the proceedings in execution in this or in other cases have been vitiated by fraud and that the entries in the order-sheet contain untrue statements of what took place in the Court below. The petition of objection of the judgment-debtors shows that they attacked the proceedings in execution as fraudulently taken. They alleged specifically that by reason of collusion between the officer of the Court and the decree-holders the notices had been deliberately suppressed and false returns had been submitted to the Court. When fraud of this description is charged, it is incumbent upon the judgment-debtors to establish at least a *prima facie* case. But reference has been made to the decisions in *Mir. Tapurah v. Gopi Narayan* (4), *Radhey Koer v. Ajodhya Das* (5), *Ananda Krishna v. Daijie Thakurani* (6) and *Mohiuddin v. Pirthi Chand Lal* (7) to show that entries in the order-sheet as to the factum of service of notice issued by the Court are not admissible in evidence. There is no room for dispute that such *ex parte* entries do not constitute conclusive evidence; at the same time, as we have said, there is no presumption that the entries are false. The party who contends that the entries do not correctly state the events that have taken place must start his case. The position is different where, as in the case of *Mir Tapurah v. Gopi Narayan* (4), where service of notice of deposit under section

(1) (1887) I. L. R. 11 Bom. 537.

(2) (1904) I. L. R. 28 Mad. 355.

(3) (1906) I. L. R. 30 Mad. 255.

(4) (1907) 7 C. L. J. 251.

(5) (1907) 7 C. L. J. 262.

(6) (1909) 10 C. L. J. 189; I. L. R. 36 Calc. 726.

(7) (1914) 19 C. W. N. 1159.

61(2) of the Bengal Tenancy Act was raised, or in *Radhay Koer v. Ajodhya* (1), where service of notice of annulment of incumbrance under section 167 of the Bengal Tenancy Act was in controversy, the entry affects a person who is not a party to the proceeding. The case of *Ananda v. Daijie* (2), merely shows that an entry in an order-sheet of a Collector in a proceeding for partition of an estate, that possession has been delivered to one of the shareholders, is no evidence that he is in possession at a subsequent date so as to bar a suit for declaratory relief. There is also a fundamental difference between the case before us and the class of cases represented by *Mohiuddin v. Pirthichand* (3) where no right accrues against a stranger till the statutory notice has been served on him. There the service of notice is the foundation of the jurisdiction of the Court, is essential for the creation of a right in the claimant; in such a case, the claimant must establish that all the statutory requirements have been strictly carried out. We feel no doubt whatever that in the case before us the burden lies upon the judgment-debtors to establish that the notices were not served upon them. If that allegation is not made out, the order of the Court dated the 21st August 1911, stands unimpeached and is an effective bar against an attack on the earlier proceedings in execution.

The result is that this appeal is allowed and the order of the Courts below discharged. The case will be remitted to the Court of first instance in order that it may, upon evidence to be adduced by both sides, determine whether the order of the 21st August 1911 was or was not made with notice to the judgment-debtors. If it is established that it was made with notice to the judgment-debtors, the objection of limitation must be overruled. If, on the other hand, it is established that the order was made without service of notice upon the judgment-debtors the question of validity of the earlier proceedings in execution, will be taken up for examination. The appellant is entitled to her costs in this Court as also in the Courts below. We assess the hearing fee at two gold mohurs in this Court and at one gold mohur in each of the Courts below. The sum payable as costs which will be specified in the decree must be deposited in the Court of first instance within one month after the arrival of the record there. If the sum is not so deposited, the objection of the judgment-debtors will stand overruled and execution will proceed forthwith at the instance of the decree-holder.

A. T. M.

*Appeal allowed: case remanded.*

(1) (1907) 7 C. L. J. 262.

(2) (1909) 10 C. L. J. 189.

(3) (1914) 19 C. W. N. 1159.

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# CRIMINAL REVISION.

*Before Mr. Justice Chaudhuri and Mr. Justice Newbould.*

CRIMINAL,

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SAHARULLA CHOWDHURY AND OTHERS

v.

KENDUA SANTHAL\*.

*Warrants, issue of—Warrants, cancelled by the Magistrate—District Magistrate, power of, to re-issue warrants—Further enquiry, if essential.*

Where a Magistrate recalled warrants issued against the accused, the District Magistrate had no jurisdiction to set aside the order of withdrawal of the warrants and to direct the warrants to be re-issued. The course open to the District Magistrate was to order a further enquiry, and after he had made such an order, he might have proceeded as the circumstances of the case justified.

*In the matter of the Petition of Gurus Charan Aich* (1) followed.

Criminal Revision.

Several persons belonging to the party of the Petitioner Saharulla Chowdhury were convicted by Babu Kunja Behari Chatterjee, a first class Deputy Magistrate, of rioting with the common object of beating the complainant Kendua Santhal and his people. It appears that warrants were issued by the learned Deputy Magistrate against the present petitioners. The conviction was, on appeal, upheld by the Sessions Judge. The learned Deputy Magistrate then passed an order to the effect: "The absconders are not required. Recall the warrants."

The complainant Kendua Santhal then made an application to the District Magistrate, and the latter set aside the order of the Deputy Magistrate, and directed that the warrants, if returned, should be re-issued and steps should be taken to enforce the attendance of the absconders.

Against this order the petitioners moved the High Court and obtained the Rule.

*Mr. Gregory* and *Babu Ashitaranjan Ghose* for the Petitioners.

*Babu Manindra Nath Banerjee* for the Crown.

The judgment of the Court was as follows:

We think that this Rule must be made absolute. The procedure adopted by the Magistrate was wrong. Authority in support of this

\* Criminal Revision No. 774 of 1916, against the order of J. A. Ezechiel, Esq., District Magistrate of Dinajpur, dated the 23rd May, 1916, setting aside the order passed by K. B. Chatterjee, Esq. Deputy Magistrate of that place, dated the 15th May, 1916.

(1) (1897) 1 C. W. N. 650.

September, 13.

proposition is to be found in *In the matter of the Petition of Guru Charan Aich* (1). It appears to us that the course open to the Magistrate was to order a further enquiry; and, after he had made such an order, he might have proceeded as the circumstances of the case justified. But, without taking any such steps, by simply ordering the reissuing of the warrants, he exceeded his authority. The bail bonds of the petitioners who are out on bail will be discharged.

A. N. R. C.

*Rule made absolute.*

(1) (1897) 1 C. W. N. 650.

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## APPELLATE CIVIL.

*Before Mr. Justice N. R. Chatterjea and Mr. Justice Newbould.*

KEDAR NATH DEY ROY

v.

LAKHI KANTA DEY.\*

*Indian Limitation Act (IX of 1908), Sch. I, Art. 182 cl. (5)—“Step in aid of execution”—Application for summoning witnesses, if saves limitation—Application in opposition to judgment-debtor's objection.*

An application for execution of a decree for possession of certain property having been made, and upon an objection having been filed by the judgment-debtor, the Court found it necessary to ascertain the standard of measurement, and for that purpose the decree-holder applied for summons upon his witnesses. The execution case was subsequently dismissed for default. A fresh application for execution of the decree having been made :

*Held*, the application made by the decree-holder for summoning witnesses was an act in furtherance of his application for execution, and was therefore a ‘step in aid of execution’ within the meaning of article 182, cl. (5) of Schedule I of the Indian Limitation Act.

A ‘step in aid of execution’ must be a positive step taken by the decree-holder on his own account in furtherance of his own application, and not merely in opposition to any objection taken by the judgment-debtor.

Appeal by the Judgment-debtor.

Application for execution of a decree. The defence was that the application was barred by limitation. The point for determina-

\* Appeal from Appellate Order No. 507 of 1914, against the order of the District Judge of Mymensing, dated the 1st August, 1914, affirming that of Babu Amulya Nath Chakravarty, Munsiff of Mymensing, dated the 23rd May, 1914.

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tion was whether an application for summoning witnesses made by the decree-holder in a previous execution case saved limitation.

*Babu Heramba Chandra Guha* for the Appellant.

*Babu Birendra Kumar De* for the Respondent.

C. A. V.

The judgment of the Court was as follows :

The question involved in this appeal is whether the application for execution of the decree out of which this appeal arises, is barred by limitation.

It appears that the appellant obtained a decree for possession of certain property and possession was delivered to him on the 28th January, 1911. The judgment-debtor raised objections to the delivery of possession by the Commissioner, and the Court found it necessary to determine the standard of measurement and, for that purpose, to take evidence in the matter. The decree-holder applied for summons upon his witnesses and witnesses were examined. The Court, after taking evidence on both sides, directed fresh delivery of possession by another Commissioner and ordered the decree-holder to deposit costs, which not having been paid, the execution case was dismissed on the 30th January 1914, for default.

The question is whether the application made by the decree-holder on the 11th February 1911, for summoning witnesses was a step in aid of execution under article 182, clause 5 of the Limitation Act.

It is true, as contended by the appellant, that a step in aid of execution must be a positive step taken by the decree-holder on his own account in furtherance of his own application and not merely in opposition to any objection taken by the judgment-debtor. But, in the present case, although possession had been delivered to the decree-holder, the judgment-debtor filed a petition of objection to the delivery of possession; and the application for execution was pending and had not been disposed of. Upon the objection of the judgment-debtor, the Court found it necessary to ascertain the standard of measurement, without the determination of which possession could not be delivered. Under these circumstances, it became necessary to adduce evidence on the point.

The application to the Court for summoning witnesses, therefore, was an act in furtherance of the application for execution which was still pending and was therefore a step in aid of execution.

The cases relied upon on behalf of the respondent were of different nature. In the case of *Troylokya Nath Bose v. Jyoti*



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*Prokash Nandi* (1), it was held that the decree-holder's opposition to an application of the judgment-debtor to sell his properties in an order different from that in which they had already been directed to be sold, was not an application to take some step in aid of execution. It was only asking the Court to refrain from taking the course which had already been taken and not asking the Court to take some positive step. In *Umesh Chunder Dutta v. Soonder Narain Deo* (2), the appearance of the decree-holder by his pleader to oppose an application made by the judgment-debtor to set aside a sale in execution of a decree, was held not to be an application to take a step in aid of execution. In *Shib Lal v. Radha Kishen* (3), the Court held that resisting or offering objections to an attempt on the part of the judgment-debtor to set off the amount of the decree against the amount due to himself is not taking some step in aid of execution. On the other hand, in the unreported case (Mis : appeal No. 373 of 1894 decided on the 7th August 1895) it was held that where a decree-holder opposing an application to set aside a sale held at his instance puts in a list of witnesses and asks the Court to summon and examine the witnesses, he takes a step in aid of execution and is entitled to have a fresh period of three years for another application for the execution of his decree.

In the present case, as already stated, there was a substantive application by the decree-holder which was pending and his application for summoning witnesses was in furtherance of the execution of the decree, namely for determining the standard of measurement without which he could not, in the opinion of the Court, obtain execution of the decree by delivery of possession. We think, therefore, that the application was a step in aid of execution and the present application for execution having been made within three years of the date on which such a step was taken, is not barred.

The appeal fails and is dismissed with costs—one gold mohur.

A. N. R. C.

*Appeal dismissed.*

(1) (1903) I. L. R. 30 Calc. 761.

(2) (1889) I. L. R. 16 Calc. 747.

(3) (1885) I. L. R. 7 All. 898.

*Before Sir Asutosh Mookerjee, Knight, Judge, and  
Mr. Justice Cuming.*

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DHIRENDRA NATH SARKAR AND OTHERS

v.

NISCHINTAPORE COMPANY.\*

*Limitation—Execution, application for—One decree passed in a suit for rent for three tenancies—Liability separate—Judgment-debtor same—Limitation Act (IX of 1908) Sch. I. Art. 18a.*

The plaintiffs instituted a suit for rent against the defendants, who held under them three distinct tenancies under three separate contracts. On the 5th June, 1911, a decree was drawn up, which specified that a certain sum A was to be realised by sale of tenure X, that a similar sum B was to be realised by sale of tenure Y, and that a third sum C was to be payable by the judgment-debtors. There was also a direction in the decree that in the event of non-satisfaction of the sums due in respect of X and Y, the balance might be recovered from the person and property of the judgment-debtors. On the 27th August, 1913, the decree-holders applied for execution of the decree. They stated that in respect of the third tenancy a separate decree had been passed and prayed, *first*, that the sum due therefrom might be realised by attachment and sale of the movable properties of the judgment-debtors, and, *secondly*, that if the whole amount due was not realised, the balance might be recovered by attachment of their persons. Subsequently, on the 16th September, 1914, an application was made for execution, wherein the decree-holders stated that "a decree had been passed in respect of the first tenure for a certain sum, that a decree had been passed in respect of the second tenure for another sum and that a decree had been passed in respect of a third tenure for a different sum." They prayed that the first two sums due might be realised by sale of the first two tenancies respectively, and that, if the whole amount was not thereby obtained, process might issue against the persons and other properties of the judgment-debtors :

*Held*, that the application for execution dated the 16th September, 1914, with regard to the sums claimed from the first two tenancies, was barred, but that in respect of the sum due from the third tenancy, was in time.

Appeal by the Judgment-debtors.

Application for execution.

The material facts and arguments appear from the judgment.

*Babus Sarat Chunder Roy Chowdhury and Satya Charan Sinha* for the Appellants.

*Babu Debendra Nath Bagchi* for the Respondents.

\* Appeal from Order No. 228 of 1915, against an order of Babu Kali Kumar Sarkar, Subordinate Judge of Nadia, dated the 13th May, 1915.

The judgment of the Court was delivered by

**Mookerjee, J.**—This is an appeal by the judgment-debtors against an order for execution of a decree for arrears of rent. On the 25th February, 1911, the respondents as plaintiffs instituted a suit for rent against the appellants as defendants, who held under them three distinct tenancies under three separate contracts. In ordinary course the landlords would have instituted three different suits for rent in respect of the arrears due. But they preferred to institute one suit for the recovery of the arrears, as they were entitled to unite in one suit different causes of action against the same set of defendants under rule 2 order 2 of the Code of Civil Procedure. They realised, however, that if a decree was obtained for the entire sum due, such decree could not, as held in a long line of authorities in this Court, be executed as a decree for rent against any of the tenures: *Mulluck Chand v. Satis Chandra* (1); *Rash Mohini Dasi v. Debendra Nath Sinha* (2). They accordingly prayed that the decree might specify the sums due in respect of each of the tenancies and that an order might be made for the realization of the sums in arrear from the respective tenancies. This was carried out and the result was that on the 5th June, 1911, a decree was drawn up which specified that a certain sum, which, for the sake of brevity, may be called A, was to be realised by sale of tenure X, that a similar sum B was to be realised by sale of tenure Y, and that a third sum C was to be payable by the judgment-debtors. There was also a direction that in the event of non-satisfaction of the sums due in respect of X and Y, the balance might be recovered from the person and property of the judgment-debtors. On the 27th August, 1913, the decree-holders applied for execution of the decree. They stated specifically that in respect of the third tenancy a separate decree had been passed and prayed, first, that the sum due therefrom might be realised by attachment and sale of the moveable properties of the judgment-debtors and secondly that if the whole amount due was not realised, the balance might be recovered by attachment of their persons. It is remarkable that in the seventh column of the application for execution, the sum shown as due was the sum realizable in respect of the third tenancy alone; in other words, the application for execution sought relief only in respect of the sum decreed with regard to the third tenancy. It is not necessary for our present purpose to narrate

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(1) (1909) 11 C. L. J. 56; 14 C. W. N. 335.

(2) (1911) 16 C. W. N. 395.

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what took place on the basis of this application, as we are now concerned with an application for execution made on the 16th September, 1914. The decree-holders stated therein that "a decree had been passed in respect of the first tenure for a certain sum, that a decree had been passed in respect of the second tenure for another sum and that a decree had been passed in respect of a third tenure for a different sum." They prayed that the first two sums due might be realized by sale of the first two tenancies respectively and that if the whole amount was not thereby obtained, processes might issue against the persons and other properties of the judgment-debtors. The judgment-debtors contended that the application was barred by limitation in so far as the decree-holder sought to realise by sale of the first two tenures the sum directed by the decree to be levied therefrom. The Subordinate Judge has overruled this contention. The question for determination, consequently, is, whether the application for execution is barred by limitation on the ground assigned by the judgment-debtors.

The answer to the question in controversy depends upon the true construction of article 182 of the second schedule to the Indian Limitation Act, 1908. The clauses relevant for this purpose are those numbered 1, 5, and 6 in the third column. The first clause provides that an application for execution of a decree of any civil Court not provided for by article 183 or by section 48, Civil Procedure Code of 1908, must be made within three years from the date of the decree. As the application for execution now under consideration was made after three years from the date of the decree, the first clause by itself is of no assistance to the decree-holders. Reliance is, consequently, placed on their behalf on clauses 5 and 6. Clause 5 refers to a case where an application has been made in accordance with law to the proper Court for execution of the decree. Clause 6 applies to a case where notice has been issued to the person, against whom execution is applied for, to show cause why the decree should not be executed against him when the issue of such notice is required by the Code of 1908; that is, in cases where the application for execution is made after the lapse of a year from the date of the decree or is made against the legal representatives of a deceased judgment-debtor. The decree-holders contend that on the 27th August 1913 an application was made in accordance with law to the proper Court for execution of the decree and that they are accordingly entitled to the benefit of clause (5). They further contend that on such application for execution, notices were issued to the judgment-debtors on the 24th

September 1913, and, that they are thus entitled to the benefit of clause (6). The appellants contend that neither clause (5) nor clause (6) is of real assistance to the decree-holders, because they took steps in respect of the decree for rent of the third tenancy and not with regard to the decree for rent of the first and the second tenancies. The contention in substance is that although there is nominally one decree in this litigation, there are in substance three decrees on one sheet of paper. The judgment-debtors argue that the term 'decree' as used in clauses 5 and 6 must be read along with the term 'decree' in column 1 of the article and that the decree-holders are not entitled to the benefit either of clause (5) or of clause (6) on proof that they have taken action with regard to what is in essence a distinct decree from the two decrees they now seek to enforce. We have not been able to trace any authority directly in point; but we are of opinion that the contention of the appellants is supported by a principle which underlies the decision of the Full Bench in *Wise v. Rajnarain Chuckerbutty* (1). It may be observed that so far back as 1866 it was recognised by this Court in the case of *Stephenson v. Unnoda Dossee* (2) that there might be nominally one decree passed in a suit, which is essentially of a composite character, and containing a number of decrees: "It may be that some decrees, though based nominally on one document are in reality separate decrees against separate individuals. In such cases, the Court might and properly would consider them to be separate, and in execution put the law of limitation in force against different defendants as if they were separate." This doctrine was ignored in the case of *Mohesh Chunder v. Mohun Lal* (3), which ruled that when a decree has been passed against several defendants, each of whom is declared to have a separate liability, in respect of a definite amount, execution against one or more of such judgment-debtors keeps the decree in force against all simultaneously. The Court, however, reverted to the view indicated in the earlier case in *Khema Debee v. Kumolakant* (4). The result was that when the question arose again in the case of *Wise v. Rajnarain Chuckerbutty* (1), the matter was referred for decision to a Full Bench. The question turned upon the true construction of section 20 of Act XIV of 1859 which was then in force, and was in these terms: "No process of execution shall issue from any Court not established by Royal Charter to enforce any judgment, decree or order of such-

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(1) (1872) 10 B. L. R. 258; 19 W. R. 30.

(2) (1866) 6 W. R. Mis. Rul. 18 (21).

(3) (1867) 8 W. R. 80.

(4) (1868) 10 B. L. R. 259 Note.

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Court, unless some proceeding shall have been taken to enforce such judgment, decree, or order, or to keep the same in force, within three years next preceding the application for such execution." With reference to this provision, it was argued that when the decree granted to the plaintiff separate reliefs against separate defendants, if proceeding had been taken to enforce the decree against one judgment-debtor, the requirements of section 20 were sufficiently fulfilled and that the effect was to keep alive the decree as against the other judgment-debtors. The substance of the contention was that the term 'decree' should be liberally construed, and, as there could be only one decree in a suit, section 20 should be so interpreted as to cover cases as well of joint decrees as of several decrees disguised under one decree. This contention was overruled by the Full Bench. Couch C. J. observed with reference to the decree before him that although the decree was made in one suit, it was in reality and substance a separate decree against each for the portion for which each was declared to be liable. [See also *Chowdhry Hureehur v. Hriday Narain* (1)]. The principle which underlies the decision of the Full Bench has now met with legislative approval and is embodied in explanation (1) to article 182 of the Indian Limitation Act, 1908, which is in terms identical with explanation (1) to article 179 of the Indian Limitation Act, 1877. On behalf of the decree-holders, however, endeavour has been made to draw a distinction between decrees made against different defendants and decrees made against the same defendants in respect of different properties. In our opinion, there is in principle no distinction between the two classes of cases. In the case before us, the defendants held from the plaintiffs as their landlords, distinct tenancies under separate contracts, the obligations for the enforcement whereof the suit was brought were distinct and arose from different contracts. The decree recognised this and entitles the plaintiffs to bring to sale distinct tenancies for the realization of the arrears leviable respectively therefrom. The position is precisely the same as if the plaintiffs had brought three distinct suits for rent against the defendants, one in respect of each tenancy. If they had instituted such suits, there would have been, on three different sheets of paper, the very decrees which we now find set out on one sheet of paper. If three suits were so brought, it is plain that the rule of limitation would have been applicable to each decree separately; and it could not have been urged for a moment that because the plaintiffs had taken out execution in respect of

(1) (1876) 25 W. R. 310.

one decree for rent against the defendants, they were protected from the bar of limitation in respect of the other decrees. We are of opinion that although there was in the present case only one suit, yet, at the instance of the plaintiffs, three distinct decrees have been made for their benefit, to enable them to proceed with execution under the provisions of the Bengal Tenancy Act with all the consequences which result therefrom, namely, to sell the tenures free of incumbrances imposed thereupon by the tenants. The plaintiffs sought this advantage and were awarded relief accordingly. If they now find themselves at a disadvantage from a different point of view which they had not possibly realised at the time, the difficulty is entirely of their own creation. There is, in our opinion, no escape from the position that the present application for execution is barred by limitation with regard to the sums claimed from the first two tenancies; but in respect of the sum due from the third tenancy, the application is in time, because made within three years from the date of the first application.

The result is that this appeal is allowed in part. The application for execution will stand dismissed in respect of the sums due from the first two tenancies stated in the seventh column. The execution, however, will proceed in respect of the sum decreed with regard to the third tenure with interest thereon. The appellants are entitled to their costs in this Court. We assess the hearing fee at two gold mohurs.

A. T. M.

*Appeal allowed in part.*

## CIVIL RULE.

*Before Sir Asutosh Mookerjee, Knight, Judge, and  
Mr. Justice Cuming.*

DEBENDRA NATH DE AND OTHERS

v.

TULSIMONI DAS.\*

*Fund invested—Land Acquisition Act (I of 1894), Sec. 32—Special Judge, if can deal with questions of application of money—Power to enquire—Hindu widow—Burden of proof—Alienation of fund invested—Application of portion of fund to discharge liability on other portion.*

\* Civil Rule No. 510 of 1916, against an order of A. J. Chotzner Esq., Land Acquisition Judge of 24-Perganahs, dated the 17th June, 1916.

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As the fund which is invested in Government securities under section 32 of the Land Acquisition Act, is in the custody of the Special Judge, he is competent to deal with the question of its application. He is competent to apply the fund in the purchase of other lands or in paying to a person who has become absolutely entitled thereto. Such authority, however, implies a power to make an enquiry.

*Mrinalini v. Abinash* (1) ; and *Kamini v. Promotho Nath* (2) referred to.

When the land is converted into money and is in the custody of a Special Judge, he is the proper officer to determine whether any portion of the fund should be made over to the widow and for this purpose to investigate whether contingencies have happened which entitle the widow to make an absolute alienation of the fund.

It is incumbent upon a Hindu widow in the first instance to establish that events have happened which entitle her to spend either in whole or in part the fund, invested in Government securities under section 32 of the Land Acquisition Act, and in the custody of the Court. When she has satisfied the Court that such events have happened, the burden shifts upon the reversioners to meet her allegations.

*Kamini v. Promotho Nath* (2) referred to.

Section 32 of the Land Acquisition Act contemplates the application of the compensation money in the purchase of other lands. These lands, when acquired, become additions to the estate of the full owner from whom the Hindu widow derives title. When a Hindu widow asks for an application of a portion of the fund to discharge a burden which has been imposed upon another portion of the estate of the husband of the lady, it is not "the investment of money in the purchase of other lands," but the satisfaction of a charge imposed upon another portion of the estate.

Application by the objectors.

Application to sell a portion of the Government securities in order to enable the applicant to satisfy a charge created by a Receiver.

The material facts and arguments appear from the judgment.

*Babus Sib Chunder Palit* and *Hit Lal Guha* for the Petitioners.

*Dr. Dwarka Nath Mitter* for the Opposite Party.

C. A. V.

The judgment of the Court was delivered by

August, 11.

**Mookerjee, J.**—We are invited in this Rule, to set aside an order, made by a Special Judge under the Land Acquisition Act, for the disposal of a portion of a fund in his custody which had been invested in Government securities under section 32. It appears that land which formed at one time part of the estate of one Khagendra Nath Dey and had, after his death, vested in his childless widow Tulsimoni Dasi was acquired under the Land Acquisition Act. The sum awarded as compensation was accord-

(1) (1910) 11 C. L. J. 533.

(2) (1911) 13 C. L. J. 597.



ingly invested in Government securities under the provisions of section 32. The widow has now applied to the Land Acquisition Judge to take steps to sell a portion of the Government securities in order to enable her to satisfy a charge created by a Receiver on land comprised in the estate inherited by her from her husband. Notice of this application was served upon the reversioners who entered appearance and objected. The Land acquisition Judge thereupon heard the objections and overruled them. We are now invited to set aside this order on two grounds :- *first*, that the Land Acquisition Judge had no jurisdiction to entertain the application of the widow ; and *secondly*, that, if he had jurisdiction, he should not have made the order without enquiry into the truth of the allegations made by her. In our opinion, the first contention is not well-founded but the second must prevail.

As regards the first objection, we observe that the principle applicable to cases of this character was explained by this Court in *Mrinalini Dasi v. Abinash Chandra Dutt* (1) and *Kamini Debi v. Promotho Nath Mookerjee* (2). These cases show that as the fund is in the custody of the Special Judge, he is competent to deal with the question of its application. There is no controversy that the Special Judge is competent to apply the fund in the purchase of other lands or in payment to a person who has become absolutely entitled thereto. Such authority, however, implies a power to make an enquiry. There is no foundation for the contention that the application should have been made to the District Judge. If the land had not been acquired for public purposes, it would have been open to the widow to alienate the same on the allegation of legal necessity without the permission of the District Judge. No doubt, in such an event the purchaser would have taken the property subject to the inevitable risk of a challenge from the reversioners when the succession should open out. The land however has been converted into money and is in the custody of the Special Judge ; he is consequently the proper officer to determine whether any portion of the fund should be made over to the widow and for this purpose to investigate whether contingencies have happened which entitle the widow to make an absolute alienation of the fund. The first objection consequently fails.

As regards the second objection, it is plain that the special Judge should have taken evidence to determine judicially whether the allegations of the widow are or are not well-founded on fact. The

(1) (1910) 11 C. L. J. 533 ; 14 C. W. N. 1024.

(2) (1911) 13 C. L. J. 597.

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orders recorded in the order sheet seem to indicate that the view which found favour with the special Judge was that the burden lay upon the reversioners to substantiate their objections. The true position, however, as explained in the case of *Kamini Debi v. Promotho Nath Mookerjee* (1) is that it is incumbent upon the widow in the first instance to establish that events have happened which entitle her to spend either in whole or in part the fund in the custody of the Court. When she has satisfied the Court that such events have happened, the burden, no doubt, shifts upon the reversioners to meet her allegations. Reliance, however, was placed on behalf of the widow upon the decision in *In re Pfleger* (2) to show that it was competent to the Special Judge to apply the funds in the purchase of other lands and that in the case before us, the application in substance invited the Special Judge to take action in this direction. In our opinion, this contention is ingenious but unsound. What section 32 contemplates is the application of the compensation money in the purchase of other lands. But these lands when acquired must become additions to the estate of the full owner from whom the widow derives title. The substance of the transaction proposed here, on the other hand, is that a portion of the fund should be applied to discharge a burden which has been imposed upon another portion of the estate of the husband of the lady. The contention put forward is that if the charge is not so satisfied, the property encumbered would be sold and would pass out of the hands of the widow. But if the funds in the custody of the Special Judge are applied to save the property from impending sale, the result clearly is, not "the investment of money in the purchase of other lands," but the satisfaction of a charge imposed upon another portion of the estate. This, in our opinion, could never have been intended by the framers of section 32 as an 'investment.'

The result is that this Rule is made absolute and the order of the Special Judge discharged. The record will be returned to him in order that he may hold an enquiry into the truth of the allegations made by the widow and to determine whether circumstances have arisen which justify an alienation by the widow for legal necessity. If a case of legal necessity is made out the Special Judge will make an order for the proposed application of the fund in his custody; otherwise, the application must be dismissed. There will be no order for the costs of this Rule.

A. T. M.

*Rule made absolute : Case remanded.*

(1) (1911) 13 C. L. J. 597.

(2) (1868) L. R. 6 Eq. 426.

*Before Sir Asutosh Mookerjee, Knight, Judge, and  
Mr. Justice Cuming.*

GOSTO BEHARI BISWAS AND ANOTHER

v.

SANKAR NATH MOOKERJEE AND OTHERS.\*

CIVIL,

1916.

August, 22.

*Execution sale—Application to set aside—Transferee of immovable property pending attachment, if can apply—Owner of property—Civil Procedure Code (Act V of 1908), O. 21 R. 89.*

\* A transferee of immovable property from the judgment-debtor after attachment of property in execution of a decree for money, is competent to make an application for cancellation of an execution sale under rule 89 of order 21 of the Code of Civil Procedure.

Application by the Auction-purchasers.

Application to set aside an execution sale.

The material facts and arguments appear from the judgment.

*Babu Narendra Kumar Bose* for the Petitioners.

*Babus Bepin Behary Ghose and Surendra Kumar Bose* for the Opposite Party.

The judgment of the Court was delivered by

**Mookerjee, J.**—The question for decision in this Rule is, whether a transferee of immovable property, which has been attached in execution of a decree for money, is competent to make an application for cancellation of the sale under rule 89 of order 21 of the Code of 1908. The decree-holder attached the disputed property on the 30th July, 1914. On the 9th September 1914, the judgment-debtor transferred the property to the opposite party. On the 11th December 1914, the property was put up to sale in execution of the decree and was purchased by the petitioner. On the 7th January 1915, the transferee from the judgment-debtor applied under order 21 rule 89. The execution Court on the 20th February 1915, held that he had no *locus standi* and dismissed his application. On appeal, the District Judge reversed his order on the 25th April, 1916. We are now invited to hold that the District Judge should have affirmed the view of the primary Court that the transferee from the judgment-debtor had no *locus standi* to make an application under rule 89. No question has been raised before

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\* Civil Rule No. 567 of 1916, against an order of R. E. Jack Esq., District Judge of Nadia, dated the 25th April, 1916, reversing that of Babu Paroda Kinkar Mookerjee, Munsiff of Ranaghat, dated the 20th February, 1915.

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us as to the competence of the District Judge to entertain the appeal presented to him.

Rule 89 provides that an application for cancellation of a sale may be made by any person either owning the property sold in execution or holding an interest therein by virtue of a title acquired before such sale. The opposite party contends that he was, at the time when he made the application the owner of the property within the meaning of this rule, and, that, in any event, he held an interest therein by virtue of a title acquired before the execution sale. The petitioner answers that the title was not operative against the decree-holder under section 64 and order 21 rule 54 and, consequently, not also against him as he has purchased at the instance of the decree-holder. Special stress is laid upon rule 54 which provides in sub-rule (1) that where property is immovable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from taking any benefit from such transfer or charge. The contention is that a person who, in violation of rule 54 sub-rule (1) takes attached property, acquires no title or interest therein, not only as against the decree-holder at whose instance the attachment was effected but also as against the purchaser at the execution sale held on the basis of such attachment. In our opinion, this contention is too broadly expressed. Section 64 defines the effect of a purchase made in contravention of sub-rule (1) of rule 54. In the Code of 1882, the provision corresponding to rule 54 appeared as section 274 and was followed by section 276 now replaced by section 64. The effect of section 64 is not to invalidate for all purposes a transfer of property which has been previously attached. The effect is of a limited character and is best described in the terms used by the Legislature in section 64: 'Where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other money contrary to such attachment shall be *'void as against all claims enforceable under the attachment.'* That this rule has a restricted application was pointed out by the Judicial Committee in the case of *Anund Loll v. Jullodhur Shaw* (1) where Sir Robert Collier discussed the effect of section 240 of Act VIII of 1859, which used even stronger terms than what find a place in section 64, and enacted that "a private alienation of an attached property, whether by sale gift or otherwise, during the continuance of the attachment, *shall be null and void.*" Sir

(1) (1872) 14 M. L. A. 543 (549); 10 B. L. R. 134; 17 W. R. 313.

Robert Collier put the question—Are these words to be taken in the widest possible sense *i.e.*, null and void against all the world including even the vendor, or to be taken in the comparatively limited sense attached to them by the Courts in India? He then adopted the language of Sir Barnes Peacock in the judgment under appeal [*Anandalal v. Radhamohan* (1)] and held that the object was to make the sale null and void so far as it might be necessary to secure the execution of the decree and therefore related only to alienation which would affect the creditor who obtained the attachment. The same view was affirmed with reference to the corresponding provision in subsequent Codes, in the case of *Dinobundhu Shaw v. Jogmaya Dasi* (2). In the case before us, there is no question of protection to the decree-holder, or of the enforcement of the claim under the attachment. The effect of the application under rule 89, if granted, is forthwith to satisfy the entire decree. It may be that in some instances the effect is to place the decree-holder in a better position than he occupies under the execution sale. For instance, it is conceivable that the execution sale might not have realised an amount sufficient to satisfy the entire decree. If an application is made under rule 89 and is allowed, the first condition for the grant of the application is that the entire decree should be satisfied. Consequently by no stretch of language can it be said that when an application is made in conformity with rule 89 any question arises as to a claim enforceable under the attachment within the meaning of section 64. We must hold accordingly that the transferee from the judgment-debtor after attachment became the owner of the property and undoubtedly acquired an interest therein within the meaning of rule 89 and was competent to apply under that section.

The result is that this Rule is discharged with costs—one gold mohur.

A. T. M.

*Rule discharged.*

(1) (1868) 2 B. L. R. F. B. 49; 11 W. R. O. C. J. 1.

(2) (1901) I. L. R. 29 Calc. 154.

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*Mookerjee, J.*

## APPEAL FROM ORIGINAL CIVIL.

*Before Sir Lancelot Sanderson, Knight, Chief Justice, and Sir  
Asutosh Mookerjee, Knight, Judge.*

CIVIL.

1917.

January, 10.

MAHARAJ BAHADUR SING

v.

INDER CHAND BOTHRA.\*

*Decree, execution of—Civil Procedure Code (Act XIV of 1882), Sec. 248—Order  
for execution made without notice, if valid—Notice to representative of  
judgment-debtor, of application for transmission of decree.*

Notice under section 248 of the Code of Civil Procedure is requisite ; but no such notice is essential, if the requisite notice was given upon a previous application for execution.

A notice given to the representative of the judgment-debtor, of the application for transmission of a decree, cannot be treated as notice given upon a previous application for execution within the meaning of section 248 of the Code of Civil Procedure.

If a notice under section 248 of the Code of Civil Procedure is requisite, an order for execution made without notice, is a nullity.

Appeal by the Judgment-debtor.

Application for execution by the assignee of the decree.

The material facts of the case are set forth in the following judgment of

1916.

August, 29.

Chitty, J.—In this case a question arose whether the decree was barred by limitation ; in other words, whether there had ever been any revivor. The decree was passed on 19th June, 1896, for Rs. 13,150-1 in favour of Kapoor Chand Kharrar. Kapoor Chand Kharrar died and on 18th August, 1907, Surajmull purporting to be the only son of the decree-holder, applied to this Court for transmission of this decree to the Murshidabad Court for the purpose of enforcing it against Maharaj Bahadur Dhunput Singh who was the only son of the judgment-debtor who had also then died. Notice was issued under section 248 (a) and (b) because not only had more than a year elapsed but enforcement of the decree was applied for against the legal representatives of the judgment-debtor. That notice was duly served and a question arose as to whether Surajmull required a succession certificate before he could be allowed to execute the decree. The matter was referred to the Judge in Chambers by consent of both parties and on 23rd August, 1907, Mr. Justice Harington passed an order under

\* Appeal from Original Order No. 104 of 1916, against the order of Mr. Justice Chitty, dated the 29th August, 1916, sitting on the Original side.

section 248, against Maharaj Bahadur Dhunput Singh as the legal representative of the deceased judgment-debtor. The present application was made on 11th August, 1916. It is therefore within twelve years of 23rd August, 1907, the date of Mr. Justice Harington's order. This fact appears to me to distinguish this case from the case of *Chutterpat Singh v. Sait Sumari Mal* (1). There was a judicial pronouncement by Mr. Justice Harington under section 248, that the decree was capable of execution. It is clear that by that order a revivor of the decree would take place.

A further point was taken with regard to the right of the present assignee of the decree to execute it. It appears that Surajmull in 1907 falsely represented that he was the only son of the decree-holder who had left another son Hari Charan. The family was a joint Mitakshara family and the question of the necessity for Surajmull taking out a succession certificate was dealt with by Mr. Justice Harington in the presence of the judgment-debtor. The other brother does not seem to have taken any part in the execution of this decree, but he is said to have joined in the sale to the present applicant; we find that the judgment-debtor has on several occasions appeared before this Court in the matter of execution and has never raised the objection that Hari Charan was a necessary party to any of those applications. As a matter of fact it does not appear that he was a necessary party. The whole decree descended by survivorship to Surajmull as well as to Hari Charan and Surajmull would be entitled to apply for execution. It is unnecessary to consider whether Hari Charan has lost any right which he might have had under the decree inasmuch as the decree has not been transferred by both the brothers to the present applicant. I think that the decree is not barred by limitation and that the present applicant should be allowed to proceed with the sale of the property No. 58 Burtolla Street, which sale was ordered by the Court but eventually adjourned *sine die* on 28th August, 1910. The application will, therefore, be allowed with cost. The order will be in terms of the prayer of the petition.

Against this order, the judgment-debtor appealed.

*Sir S. P. Sinha* and *Messrs. N. Sarkar* and *B. L. Mitter* for the Appellant.

*Mr. S. K. Chakrabarty* for the Respondent.

The judgments of the Court were as follows :

*Sanderson, C. J.*—This is an appeal from the judgment of

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*Chitty, J.*

January, 10.

(1) (1916) I. L. R. 43 Calc. 903 ; 23 C. L. J. 645.

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Mr. Justice Chitty whereby he allowed the application of Inder Chandra Bothra to be at liberty to proceed with the sale of premises No. 58 Burtolla Street in the town of Calcutta, attached in execution of the decree in question. In order to state the point it is necessary to examine the facts. It appears that on the 19th of June, 1896, one Kapoor Chand Kharar obtained a decree against Maharaj Bahadur Dhunput Singh for Rs. 13150. The application in this case was made by the holder of the assignment from the sons of the original creditor, and the opposite parties are the sons of the original debtor. On the 18th of May, 1907, an application was made by the son of the decree-holder for transmission of the decree to the District Court of Murshidabad for the purpose of having the decree executed. On the 28th of August, 1907, an order for transmission was made by Mr. Justice Harington. The matter came before Mr. Justice Harington in this way. It appears that the matter having come before the Registrar, an objection was taken that no succession certificate had been produced by the applicant, and the Registrar consequently referred the matter to Court, and Mr. Justice Harington was the learned Judge who disposed of it. The facts are stated by Mr. Justice Chitty in his judgment. Having stated that 'notice was duly served and that a question arose as to whether Surajmull required a succession certificate before he could be allowed to execute the decree,' he says, "The matter was referred to the Judge in Chambers by consent of both parties and on the 23rd of August, 1907, Mr. Justice Harington passed an order under section 248 against Maharaj Bahadur Dhunput Singh as the legal representative of the deceased judgment-debtor." That decree was not transmitted, and, on the 4th of September, 1907, an application was made by the same parties for the attachment and sale of certain premises in Calcutta, namely No. 58 Burtolla Street. In the application it was stated that the property was inherited by Maharaj Bahadur Singh as the sole heir under the Mitakshara Law from the deceased defendant Rai Dhunput Singh Bahadur. In respect of that application no notice was issued to the representatives of the deceased judgment-debtor, the Registrar in his order expressing the view that no notice was necessary either under section 232, Civil Procedure Code or under section 248 (a), Civil Procedure Code, the decree having been transferred to the applicants by operation of law and the Court having in a previous application ordered execution against the same person as legal representative of the deceased judgment-debtor. On the 17th of September an attachment was made of the property in Calcutta, and on the 29th of



July, 1908, an order for sale was made. Both these orders, as I understand were made without notice to the representatives of the deceased judgment-debtor. After that, apparently, the holders of the decree changed their mind ; they did not proceed with the order for sale, but another application was made for transmission of the decree, and that was made on the 25th of August, 1908. The Master, dealing with this application in the ordinary course made an order that the decree should be transmitted. On the 17th of May, 1909, the learned District Judge of Berhampur returned the decree to the High Court with a note that the matter had been dismissed for want of prosecution. Then on the 12th of March, 1910, the holder of the decree applied to proceed with the order of 29th of July, 1908, which, it will be remembered, was the order for the sale of the premises in Calcutta. Then on the 21st of April, 1910, the Master made an order for the sale of the premises, and it will be noted that that order was made when the Master was acting under the old rules of the Code, the new rules, as pointed out by the learned Advocate-General, not having come into force until the 15th of April, 1914, I might incidentally mention here—although I do not think it is necessary for my judgment in this case as at present advised,—that that order of the Master would be without jurisdiction.

The property was advertised for sale and a date was finally fixed for the sale of the property on the 25th of August, 1914. Then the representative of the judgment-debtor came upon the scene again and applied to have the attachment of September, 1917, set aside on the ground that the property was trust property : and, as I understand—the application was made in his capacity as trustee. Then the holder of the decree came upon the scene again, and upon his application the sale was adjourned *sine die*. That was in August, 1914. Nothing happened then until two years later, when on the 29th of August, 1916, the present applicant Inder Chand Bothra having obtained an assignment of the decree from the sons of the decree-holder made this application to the Court, and, as I have already stated that was an application for leave that he might be allowed to proceed with the sale of the said attached property in terms of the order of the 29th July, 1914. Now, those are all the facts—which I think necessary to state for the purpose of my judgment. The matter really is within a narrow compass.

The learned Advocate-General argued first of all that inasmuch as there was no notice of the application dated the 4th of September

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1907, which was for the attachment of the premises in Calcutta served upon the representatives of the judgment-debtor, the subsequent proceedings in respect of that application, namely, the attachment of the 17th of September 1907, and the order for sale of the 29th of July 1908, were both invalid, inasmuch as they were made without jurisdiction. That depends upon section 248 of the Civil Procedure Code which was then in force. That section says as follows :

"The Court shall issue a notice to the party against whom execution is applied for, requiring him to show cause, within a period to be fixed by the Court, why the decree should not be executed against him (a) if more than one year has elapsed between the date of the decree and the application for its execution, or (b) if the enforcement of the decree be applied for against the legal representative of a party to the suit in which the decree was made" (b) certainly applies to this case ; (a) also applies to this case. There is a proviso to the section which runs as follows "Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution, if the application be made within one year from the date of any decree passed on appeal from the decree sought to be executed, or of the last order against the party against whom execution is applied for, passed on any previous application for execution." If the order for transmission which was made by Mr. Justice Harington on the 23rd of August 1907, was an order passed on a previous application for execution, then no notice under the proviso to the section would be necessary in respect of the application of the 4th of September, 1907. On the other hand, if the order of the 23rd of August 1907, of Mr. Justice Harington was not an order passed on a previous application for execution, then notice in respect of the application of the 4th of September 1907, ought to have been given, and if such notice was necessary and if it was not in fact given then the attachment and the order for sale were made without jurisdiction. Therefore, the question to be considered is whether the order made by Mr. Justice Harington was passed on a previous application for execution. In my judgment it was not such an order. Having regard to the decision of a Full Bench of this Court in *Chatterput Singh v. Sait Sumari Mal* (1), it is necessary for us to look at the substance of the application and the order that was made on it. There is no doubt that the application was merely an application that the decree should be

(1) (1916) L. L. R. 43 Calc. 903 ; 23 C. L. J. 645.

transmitted by this Court to the District Court of Murshidabad, and whatever form may have been used in the course of the proceedings, the learned Judge in effect was deciding that the order asked for, namely that the decree should be transmitted to the District Court, should be made. Having regard to the Full Bench decision, that was not an order passed on a previous application for execution, and, consequently I am of opinion that notice of the application of the 4th of September, 1907 was necessary under section 248 of the Civil Procedure Code then in force, and inasmuch as no notice was in fact given the attachment and the order for sale of the 29th of July, 1908, were made without jurisdiction, as it was made *ex parte*. Therefore, when the applicant in this case, Inder Chand Bothra, comes to this Court and asks for leave to carry out the order of the 29th of July, 1908, he is asking this Court to carry out an order which was made without jurisdiction. That application, therefore, ought to be refused.

There is one other matter which I may mention. I say nothing as to whether the application of the 4th of September, 1907, still is one, of which the applicant in this case can avail himself. It may be that he can avail himself of the proceedings which were started by that application, or it may be that he cannot avail himself of the proceedings started by that application; and, I say nothing to intimate what view ought to be taken by a Court, supposing any further application were to be made by the applicant in this case in respect of such proceedings.

For these reasons I think the appeal ought to be allowed and the learned Judge's order set aside and the application dismissed with costs both in the Court of appeal and the Court of first instance.

Mookerjee, J.—I agree that the order of Mr. Justice Chitty cannot be supported.

On the 1st September, 1914, the respondent took assignment, from the representatives of Kapur Chand Knarar, of a decree for money made on the 19th June, 1896, on the Original side of this Court against Rai Dhanpat Singh Bahadur, the predecessor in interest of the appellant. On the 29th August, 1916, the respondent, as such assignee, applied to this Court to carry out an order for sale of immovable property made so long ago as the 29th July, 1908, after attachment had been effected *ex parte* on the 17th September, 1907, on the basis of an application for execution dated the 4th September, 1907. Mr. Justice Chitty has granted this

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prayer, and the question for determination is, whether this order can be supported.

On behalf of the judgment-debtor appellant, the Advocate-General has argued that the order for sale, as also the antecedent order for attachment, were made without jurisdiction, and no further proceedings can be taken on the basis thereof. The reason assigned for this contention is that the attachment and the consequent order for sale were made without the requisite notice to the judgment-debtor under clauses (a) and (b) of section 248 of the Civil Procedure Code of 1882, then in force. The argument in substance is that if a notice was requisite, the order for execution made without notice must be deemed to be a nullity, as is shown by the decision of the Judicial Committee in *Raghunath Das v. Sundar Das Khetri* (1) which confirms the view taken in a long series of cases in India reviewed in *Venkatesa Perumal v. Srinivasa Runga Raw* (2) and *Syam Mandal v. Sati Nath Banerjee* (3). The question consequently arises, whether notice under section 248 was requisite in the circumstances of this case. The decree-holder was dead; so also was the judgment-debtor; and more than one year had elapsed from the date of the decree when the application for execution was made on the 4th September, 1907. Consequently, *prima facie*, notice under section 248 was requisite; but no such notice would be essential, if the requisite notice had been given upon a previous application for execution. The only previous notice to which reference has been made was a notice given upon an application made on the 18th May, 1907, for transmission of the decree, and granted by Mr. Justice Harington on the 23rd August, 1907. This, however, is plainly not a notice as contemplated by section 248, Civil Procedure Code. The fundamental distinction between an application for transmission of a decree and an application for execution of a decree, was fully analysed and examined in the case of *Sreepati Charan v. Shamaldhone* (4), and was also incidentally explained by the Full Bench in *Chutterput Singh v. Sait Sumari Mal* (5); that view has now been confirmed by the decision of the Judicial Committee in *Moharaja of Bobbili v. Rajah Narasaraaju* (6). Consequently, the notice given to the representatives of the judgment-debtor, of the application for transmission of the decree cannot rightly be treated as notice given upon a previous application for

(1) (1914) L. L. R. 42 Calc. 72; 20 C. L. J. 555; L. R. 41 I. A. 251.

(2) (1909) L. L. R. 33 Mad. 187. (3) (1916) 24 C. L. J. 523.

(4) (1910) 15 C. L. J. 123; 15 C. W. N. 661.

(5) (1916) L. L. R. 43 Calc. 903; 23 C. L. J. 645.

(6) (1916) 21 C. W. N. 162; 24 C. L. J. 478.

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execution within the meaning of section 248 of the Code of 1882. The true position then is that notice under section 248 was requisite upon the application of the 4th September, 1907, that such notice admittedly was not given, that the orders of the 7th September, 1907, and the 29th July, 1908, were made without jurisdiction, and that consequently, no legal proceedings can be taken on the basis thereof.

It has been argued however that this contention is not open to the appellant by reason of certain proceedings which took place in 1910, and may be briefly described. On the 12th March, 1910, the decree-holder made an application for sale. The usual order was made by the master on the 21st April, 1910. No further action appears to have been taken on the basis of this application. But on the 27th August, 1914, the appellant in his character as trustee of the estate of his grandfather appeared in Court and contended that the property sought to be sold was trust property and was not liable to be seized in execution of a decree obtained against his father. Mr. Justice Chitty on the 27th August, 1914, overruled this objection. The contention of the respondent is that this order attracts the operation of the rule laid down by the Judicial Committee in *Mungal Pershad v. Grija Kant* (1). That case, however, can have no possible application to the circumstances of the present litigation, for there was no determination by Mr. Justice Chitty, directly or by implication, on the 27th August, 1914, that the order for attachment made on the 27th September, 1907, and the order for sale made on the 29th July, 1908 were valid and legal orders. In my opinion the point taken by the appellant is open to him and really concludes the matter. In these circumstances I need not express an opinion upon the question whether the application for execution made on the 4th September, 1907, may be deemed as still pending and whether an application to revive it and to carry on proceedings on the basis thereof may still be entertained by this Court on the principle recognized by the Judicial Committee in *Kamaruddin v. Jawahir Lal* (1) or is liable to be refused as an abuse of the process of the Court. I agree that this appeal must be allowed and the application dismissed with costs throughout.

*Messrs. B. N. Basu & Co.*—Attorneys for the Appellant.

*Mr. A. D. Banerjee*—Attorney for the Respondent.

A. T. M.

*Appeal allowed.*

(1) (1881) I. L. R. 8 Calc. 51; L. R. 8 I. A. 123; 11 C. L. R. 113.

(r) (1905) L. R. 32 I. A. 102; I. L. R. 27 All. 334; 1 C. L. J. 381.

## CIVIL RULE.

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April, 19.  
May, 7.*Before Mr. Justice Teunon and Mr. Justice Richardson.*

NIBARAN CHANDRA CHUCKERBUTTY AND OTHERS

v.

AKSHOY KUMAR BANERJEE.\*

*Criminal Procedure Code (Act V of 1898) Sec. 195, Clause (6), Cl. (7) Sub-clause (c)—Sanction to prosecute—Sanction, revocation of—Provincial Small Cause Court, if subordinate to Court of the District Judge.*

A Provincial Small Cause Court is under sub-clause (c) of clause 7 of section 195 of the Criminal Procedure Code to be deemed to be subordinate for the purposes of that section to the Court of the District Judge.

*In re Ram Prasad Malla* (1), and *Sewbalak Singh v. Ramadhin Bania* (2) referred to.

*Ajudhia Prasad v. Ram Lal* (3), *Ambica Tewary v. King-Emperor* (4) and *Sukhdeo Singh v. The District Magistrate of Muzaffarpur* (5) not followed.

## Civil Revision.

The accused Nibaran Chandra Chuckerbutty instituted a suit in the Court of the Small Cause Court Judge at Jessore, against the Opposite Party Akshoy Kumar Banerjee and his brothers, on the basis of a hand-note alleged to have been executed by their father, since dead. The learned Small Cause Court Judge having held that the hand-note was not a genuine document, dismissed the suit, and granted the opposite party sanction to prosecute the aforesaid Nibaran Chandra Chuckerbutty and his witnesses, for the offence or offences they might have committed. An application was then made to the District Judge for revocation of the sanction, and the learned District Judge having held that he had no jurisdiction to deal with the case under section 195 of the Code of Criminal Procedure, inasmuch as the sanction was given by the Small Cause Court Judge and no appeal lay to him from the decrees of that Court, rejected the application.

Against that order the Petitioners moved the High Court and obtained the Rule.

*Babu Taradas Chatterjee* for the Petitioners: The learned District Judge had the jurisdiction to entertain the application for

\* Civil Revision No. 8 of 1917, against the order of P. B. Cammiade Esq., District Judge of Jessore, dated the 26th February, 1917, rejecting an application for revision of an order of Babu Bepin Chandra Chatterjee, Small Cause Court Judge of Jessore, dated the 25th September, 1916.

- (1) (1909) I. L. R. 37 Calc. 13. (2) (1910) I. L. R. 37 Calc. 714 (721).  
(3) (1911) I. L. R. 34 All. 197. (4) (1916) 1 Pat. L. J. 206.  
(5) (1916) 2 Pat. L. J. 1.

revocation of the sanction granted by the Small Cause Court Judge. The District Court is the principal Court of original jurisdiction, and as such the Small Cause Court is subordinate to the District Court for the purposes of section 195 of the Criminal Procedure Code: see section 195 clause (7), sub-clause (c) of the Code, which expressly provides for cases where no appeal lies. The meaning of the expression "that is to say" in section 195 clause (7) as held in the case of *Sukhdeo Singh v. The District Magistrate of Muzaffarpur* (1) is not correct. If the case does not come under section 195 clause (7) sub-clause (c), it clearly comes under section 195 clause (7), as appeals lie to the Court of the District Judge in certain cases under section 24 of the Provincial Small Cause Courts Act. Referred to the case of "*In re Ram Prasad Malla*" (2), where the jurisdiction of the District Judge to entertain such applications was not doubted.

*Babu Kshetra Mohan Ghose* for the Opposite Party. The District Judge has no jurisdiction to entertain an application against an order either granting or refusing sanction passed by a Small Cause Court Judge. No appeal lies to the District Judge against a decree passed by a Small Cause Court Judge. For the purpose of section 195 of the Code of Criminal Procedure a Provincial Small Cause Court is not subordinate to the Court of the District Judge. See the cases of *Sukhdeo Singh v. The District Magistrate of Muzaffarpur* (1), *Ambica Tewary v. King-Emperor*, (3) and *Ajudhia Prasad v. Ram Lal* (4).

*Babu Taradas Chatterjee* in reply.

C. A. V.

The judgment of the Court was as follows :

The short question which arises upon this Rule is whether a Provincial Small Cause Court is under sub-clause (c) of clause (7) of section 195 of the Criminal Procedure Code to be deemed to be subordinate for the purposes of that section to the Court of the District Judge.

Our attention was drawn to three cases in which this question was answered in the negative, the case of *Ajudhia Prasad v. Ram Lal* (4), decided by the Allahabad High Court and the cases of *Ambica Tewary v. King-Emperor* (3) and *Sukhdeo Singh v. The District Magistrate of Muzaffarpur* (1) decided by the Patna High Court. The last two cases depend upon the first mentioned case

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(1) (1916) 2 Pat. L. J. 1.

(2) (1909) I. L. R. 37 Calc. 13.

(3) (1916) 1 Pat. L. J. 206.

(4) (1911) I. L. R. 34 All. 197.

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in which it was held that the words "Where no appeal lies" in clause 7 (c) refer to cases in which no appeal lies decided by a Court from which appeals ordinarily lie to some other Court and not to Courts from which no appeal lies in any case. There the original proceedings were in a revenue Court, the Court of an Assistant Collector, but in the course of his judgment Chamier, J. incidentally observed (pages 201 and 202) "The result of this construction is possibly that the Legislature has made no provision in section 195 for an appeal against an order of a Small Cause Court giving or refusing sanction, and it may be that the only Court which can interfere with such an order is the High Court. The result may not have been contemplated....." In *Ambica's case* (1) where the original proceedings were in a Small Cause Court Chamier, C. J. adhered to this expression of opinion and the Court held that the District Judge had no jurisdiction to entertain an appeal or application under clause (6) of section 195.

The construction so adopted is founded upon the fact that sub-clause (c) must be read, not as a separate clause, but along with the opening words of clause (7), which runs "for the purposes of this section every Court shall be deemed to be subordinate only to the Court to which appeals from the former Court ordinarily lie", that is to say—when these words are read with sub-clause (c), undoubtedly a difficulty does arise. Nevertheless, where there are Presidency Towns, the accepted view seems to be that a Presidency Small Cause Court is subordinate to the High Court within the limits of whose original jurisdiction it is situate: *Ramadhir Bania v. Sewbalak Singh* (2), *Jamna Dass v. A. M. Sabapathy Chetty* (3), and if that be so it would appear to follow that a Provincial Small Cause Court is similarly subordinate for the purposes of section 195 to the Court of the District Judge. This view moreover is in accordance with the prevailing practice in this Province, where the jurisdiction of the District Judge in such cases has never been doubted (cf. *In re Ram Prasad Malla* (4)). I am not prepared to say that that practice ought now to be disturbed or that the language is incapable of a construction consistent therewith.

During the course of the argument it was pointed out that under section 24 of the Provincial Small Cause Courts Act certain appeals do lie to the District Court. Though this provision may not be

(1) (1916) 1 Pat. L. J. 206. (2) (1910) I. L. R. 37 Calc. 714 (721).  
(3) (1911) I. L. R. 36 Mad. 138.  
(4) (1909) I. L. R. 37 Calc. 13.



sufficient to make the latter Court the Court to which appeals from a Small Cause Court ordinarily lie it is not perhaps without a bearing on the construction of section 195 (7) of the Criminal Procedure Code.

In the view indicated, this Rule must be made absolute. The application in question which the learned District Judge, following *Ambica's case*, (1) has held that he had no jurisdiction to entertain, will be heard and determined by him as an application under section 195 (6) of the Criminal Procedure Code.

A. N. R. C.

*Rule made absolute.*

(1) (1916) 1 Pat. L. J. 206.

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## CRIMINAL REVISION.

*Before Mr. Justice Teunon and Mr. Justice Richardson.*

MUCHI MIAN

*v.*

KING-EMPEROR.\*

CRIMINAL.

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May, 24, 18.

*Indian Penal Code (Act XLV of 1860), Sec. 216 B—"Assisting a person in any way", meaning of.*

The expression "assisting a person in any way" in section 216 B of the Indian Penal Code is not restricted to methods which may properly be regarded as *ejusdem generis* or of a like nature with supplies of food or of other necessary articles.

*Emperor v. Husain Bahásh (1) dissented from.*

Criminal Revision.

The accused was convicted under section 216 of the Indian Penal Code for harbouring his brother, one Azizar Rahaman, who had been charged with an offence under section 411, Indian Penal Code, and for whose apprehension a warrant of arrest had been issued, and sentenced to undergo rigorous imprisonment for six months.

The material facts will appear sufficiently from the judgment.

\* Criminal Revision, No. 441 of 1917, against the order of W. N. Delevigne Esq., Sessions Judge of Midnapur, dated the 5th April, 1917, affirming that of J. M. Chaudhuri Esq., Deputy Magistrate of that place, dated 13th March, 1917.

(1) (1903) 1 L. R. 25 All. 261.

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May, 28.

*Mr. Zorab with Babus Manmatha Nath Mukherjee and Santosh Kumar Pal* for the Petitioner.

*Mr. Remfry* for the Crown.

C. A. V.

The judgment of the Court was as follows :—

In this case the petitioner has been convicted under section 216 of the Indian Penal Code and sentenced to six months' rigorous imprisonment.

It appears that the petitioner's brother one Azizar Rahman was charged with the commission of an offence punishable under section 411 Indian Penal Code, that to the knowledge of the petitioner first warrants for Azizar's arrest and then a proclamation under the provisions of section 87 of the Code of Criminal Procedure had been issued by a Magistrate. It also appears that the proclamation had been duly published at the house in which the two brothers as joint owners used to reside.

On the 23rd September 1916, on information received, an Inspector of Police with a Sergeant and a posse of constables proceeded to his house, and interviewed the petitioner.

The facts then found against the petitioner are that in answer to the Inspector's enquiry the petitioner replied that Azizar was in the house and promised to produce him. He then went inside the house and after a delay of 15 minutes returned with Azizar's son and said that he had made a mistake and that it was the son who had come to the house the preceding evening. The learned Sessions Judge has further found that the statement made to the police officer in the 1st instance, the delay of 15 minutes, spent as the Police officer would presumably infer on a search for the offender, the subsequent production of Azizar's son, and the false statement made with regard to Azizar himself, who on search was in fact found in hiding in the thatch of the roof, were all parts of a plan by which the petitioner sought to give and did give Azizar Rahman an opportunity of making his escape or of concealing himself.

On behalf of the petitioner it is contended that the facts found are insufficient for the finding that the petitioner "assisted (the offender) in any way to evade apprehension" and so "harboured" him within the meaning of sections 216 and 216 B, Indian Penal Code. In support of this contention it is urged that the words "assisting in any way" should be read as "*ejusdem generis*" with the two methods specified in the preceding part of the section, and in further support of this view we are referred to the case of *Emperor*

*v. Husain Bakhsh* (1). But this case though entitled to our great respect is not one which we are bound to follow and moreover the facts in that case were wholly different. If the intention had been that the words "assisting in any way" should be read as *ejusdem generis* with the former part of the section we should have expected the Legislature to frame this provision of law somewhat in the following manner "the word 'harbouring' includes the giving of assistance by supplying a person with shelter, food.....means of conveyance or otherwise."

As the section has been framed we are not prepared to hold that the ways, in which assistance may be rendered, must, for the purposes of the section, be restricted to methods which may properly be regarded as *ejusdem generis* or of a like nature with supplies of food or of other necessary articles.

On the contrary we are of opinion that by the methods he employed the petitioner did give time and opportunity for the offender to conceal himself or effect his escape and thereby gave him material assistance in evading apprehension.

In this view the petitioner has been properly convicted but having regard to all the facts we are of opinion that the sentence is unnecessarily severe. We therefore reduce the sentence from six months to three months rigorous imprisonment.

The petitioner will now surrender to his bail and serve out the unexpired portion of his sentence.

A. N. R. C.

*Rule made partly absolute.*

(1) (1903) I. L. R. 25 All. 261.

## PRIVY COUNCIL.

PRESENT :—*Viscount Haldane, Lord Atkinson, Sir John Edge and Mr. Ameer Ali.*

T. A. BALAKRISHNA UDAYAR

*v.*

VASUDEVA AIYAR.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT MADRAS.]

*Religious Endowments Act (No. XX of 1863), Sec. 10—Temple Committee—Vacancy—Powers of the civil Court—court—Judge—Persons designated—*

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*Order passed under that section—Code of Civil Procedure (Act V of 1908), Section 115—'Case', meaning of.*

Section 10 of the Religious Endowments Act, does not empower the civil Court to make an order directing the committee appointed under the Act, when they have failed to hold an election to fill up a vacancy, to fill it up by means of an election or to validate the filling up of it by these means in obedience to such an order. The Court can direct the remaining members of the Committee to fill up the vacancy, but the filling up of it must be their act.

The jurisdiction given to the civil Court under that section is given to the civil Court and not to an individual Judge who may preside in or constitute the civil Court.

The making of an order, which purports to have been made in exercise of the powers conferred upon a civil Court by the said section, is a judicial and not merely an administrative or ministerial act. In such matters the civil Court exercises its powers as a Court of law, not merely as a *persona designata* whose determinations are not to be treated as judgments of a legal tribunal.

Section 115 of the Code of Civil Procedure 1908, enables the High Court, in a case in which no appeal lies, to call for the record of any case and to pass such an order therein as the Court may think fit. The section applies to jurisdiction alone, the irregular exercise, or non-exercise of it, or the illegal assumption of it; the section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved.

The word "case" in that section is defined in the Code. It cannot be confined to a litigation in which there is a plaintiff who seeks to obtain a particular relief against a defendant before the Court, but includes an *ex parte* application praying that persons in the position of trustees or officials should perform their trust or discharge their judicial duties. It includes therefore an order of the civil Court purporting to have been made in exercise of the powers conferred thereon by section 10 of the Religious Endowments Act. *Meenakshi Naidoo v. Subramaniaya Sastri* (1) distinguished. *Vasudeva Aiyar v. The Negapatam Devasthanam Committee* (2), affirmed.

Appeal against the order of the High Court of Madras in *Vasudeva Aiyar v. The Negapatam Devasthanam Committee* (2) reversing an order of the District Judge of Tanjore.

The facts of the case are sufficiently stated in their Lordships' judgment.

*De Gruyther, K. C.*, and *J. H. C. Sproule* for Appellant: The whole scheme of Act XX of 1863 is that the persons interested in a religious endowment should have in the first place at all events the right to elect when there is a vacancy in the managing committee. Section 10 is imperative: the new member "shall be elected." The District Judge has power to make the committee hold an election: to do what they ought to have done.

(1) (1887) L. R. 14 I. A. 160; I. L. R. 11 Mad. 26.

(2) (1913) I. L. R. 38 Mad. 594.

Secondly, the District Judge's order was not a judicial proceeding and was not subject to revision by the High Court under section 115 of the Civil Procedure Code: *Meenakshi Naidoo v. Subramaniya Sastri* (1).

This is not a "case" which has been "decided" within the meaning of section 115. "Case" means "suit" or "proceedings in a suit": *Subbier v. Abbey Naidu* (2).

The first order of the District Judge was merely a direction to "fill up" the vacancy. There is no reason why the committee should hold an election first, and co-opt in accordance with it: it is they who "fill up" the vacancy.

*Sir Erle Richards, K. C.*, and *Kenworthy Brown*, for Respondent, were not called on.

Their Lordships' judgment was delivered by

**Lord Atkinson.**—This is an appeal from a judgment and order of the High Court of Madras dated the 23rd September, 1913, setting aside an order of the District Judge of Tanjore dated the 19th July, 1913, by which the appellant was appointed a life member of the Devasthanam (Temple) Committee of Negapatam. This order of the District Judge purports to have been made, in the events which had happened, in exercise of the powers conferred upon him by section 10 of Act XX of 1863, The Bengal and Madras Native Religious Endowments Act.

The section runs as follows :—

"Whenever any vacancy shall occur among the members of a Committee appointed as above, a new member shall be elected to fill the vacancy by the persons interested as above provided. The remaining members of the Committee shall as soon as possible give public notice of such vacancy, and shall fix a day which shall not be later than three months from the date of such vacancy for an election of a new member by the persons interested as above provided under rules for elections which shall be framed by the local Government, and whoever shall be then elected under the said rules shall be a member of the Committee to fill such vacancy. If any vacancy aforesaid shall not be filled up by such election as aforesaid within three months after it has occurred, the civil Court, on the application of any person whatever, may appoint a person to fill the vacancy or may order that the vacancy be forthwith filled up by the remaining members of the Committee, with which order it shall then be the duty of such remaining members to comply; and if this order be

(1) (1887) L. R. 14 I. A. 160; I. L. R. 11 Mad. 26.

(2) (1915) 28 M. L. J. 671.

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not complied with, the civil Court may appoint a member to fill the said vacancy."

By the second section the words "Civil Court" and "Court" are defined to mean "the Principal Court of Original Civil Jurisdiction in the district in which the mosque temple or religious establishment is situate relating to which or to the endowment whereof any suit shall be instituted or application made under the provisions of this Act." It would appear that, if the endowments of the temple be situate in districts other than that in which the temple or religious establishment is itself situated, different Courts may in relation to it and its affairs be civil Courts within the meaning of this definition. Moreover, it is to the civil Court and not to an individual Judge who may preside in, or constitute the civil Court that jurisdiction is given.

A vacancy occurred in the above-mentioned Committee by the death on the 3rd May, 1912, of the Honourable Dewan Bahadur R. Kaghunatha Rao, C.S.I. The Committee did not hold any election of a member to fill this vacancy. On the contrary, they on the 20th June, 1912, directed their managing member to request the then District Judge of Tanjore, Mr. A. F. G. Moscardi, to nominate, in exercise of the powers conferred upon him by the above-mentioned section, a person to serve upon the Committee. That request was duly made by the managing member by letter addressed to the District Judge on the 16th July following.

The District Judge, having considered this letter, made an order on the 1st October, 1912, requesting the managing member to report "if there was any reason why the Court should not order that the vacancy should be filled up by election, as provided in section 10 of the Act." It is clear from this letter that the District Judge considered he had under the statute jurisdiction to order the Committee to hold an election of a member in order to fill the vacancy; and though an order which he subsequently made upon the 6th January, 1913, is very guarded in its terms it has been assumed that he meant to exercise this jurisdiction.

On the 21st October, 1912, the managing member replied to the District Judge's communication of the 1st October, 1912, forwarding a copy of a resolution passed by the committee in the previous June to the effect that they would not hold an election, and renewing the request to the Judge to nominate a member. On the 2nd January, 1913, the present respondent, in the character of a person interested, filed a petition in the District Court praying the Court to fill up the vacancy in the committee by nomination, on the ground that the

list of voters was stale, and that delay would occur in preparing a new list. The same District Judge, Mr. Moscardi, made on this petition the order already referred to of the 6th January, 1913. On the face of the order it is set forth that it was argued—"that the intention of the Legislature in section 10 of the Act was clearly that such vacancies should be filled by the Committee by election, and only in the last resort by the Court."

It is also pointed out that—"the Committee had a voters' list drawn up so recently as 1909; that there was no reason why an election should not be held in this case.....and no...reason was urged why the provisions of section 10 of the Act should not govern this case."

The last paragraph of the order runs thus :—

"It is clear to me that it is the duty of the Committee to fill up the vacancy by election, and that there is no obstacle preventing them from doing so. I therefore order that the vacancy be forthwith filled up by the remaining members of the Committee. Time, three months."

It will be observed that it is not stated explicitly in this order by what process the Committee are to fill up the vacancy, whether by election or by nomination or co-option. The members of the Committee, however, owing possibly to the matters already referred to set forth on the face of the order, came to the conclusion that by it they were directed to hold an election which, on the 24th March, 1913, they accordingly did. The appellant was the only candidate; 1,745 votes were recorded for him. The committee thereupon declared him duly elected, and reported the result to the District Court.

About this time a new Judge, Mr. C. G. Spencer, was appointed to the District of Tanjore, and during the months of April and June certain applications were made to him with which it is quite unnecessary to deal.

Four petitions were then presented to the District Court, one bearing date the 23rd June, 1913, by the present appellant, praying that it might be declared that his election was valid, and that he might be permitted to perform his duties; one of the same date by the present respondent alleging that the election was void, and praying that the Court might, by its own nomination, fill the vacancy; and two bearing the respective dates of the 17th May, 1913, and 18th July, 1913, by one Dakshinamoorthi Pillai, praying that the election might be declared void for several reasons, including amongst others the alleged defective nature of the voters' lists.

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On the 19th July, 1913, the District Judge, Mr. C. G. Spencer, dealt by one order of that date with the matters of these four petitions, and decided that the election of the present appellant was regular, and accepted him as a member of the committee, on the ground that upon the true construction of the 10th section of the aforesaid Act of 1863, the words, "or may order that the vacancy be forthwith filled up by the remaining members of the Committee," must be taken to mean by implication "filled up by the members of the Committee by election," since that is the mode prescribed in the earlier portion of the section for filling up a vacancy by them. It will be observed that this order is based upon the assumption that the earlier order of Mr. A. F. G. Moscardi of the 6th January, 1913, was in effect an order directing the committee to fill up the vacancy by holding an election, and that it was understood and acted upon by them as such.

The present respondent upon the 6th August, 1913, presented a petition to the High Court asking for a revision of this order under the 115th section of the Code of Civil Procedure, to which he made the present appellant and Temple Committee respondents. On the application coming on for hearing, a preliminary objection was raised that a petition for revision of the adjudication of the District Court did not on the legal construction of the statute in such a matter as that dealt with in section 10 of the Act of 1863 lie.

The High Court held that this objection failed, and proceeded to deal with the merits of the application. In reference to them they held that, according to the true construction of the 10th section, the District Court had no jurisdiction whatever to order the remaining members of the committee (as it was taken it had ordered them) to fill up the vacancy by means of an election, or to validate the filling up of it by these means in obedience to such an order, and ordered that the order of the District Judge, Mr. Spencer, dated the 19th July, 1913, should be set aside, as made without jurisdiction, and that the case should be sent back to be dealt with by the District Court by the light of this judgment.

On the hearing of this appeal both these points have been raised and argued. In their Lordships' view the decision of the High Court was on both points right, and they fully concur in and approve of it.

As to the preliminary objection. The 115th section of the Civil Procedure Code enables the High Court, in a case in which no appeal lies, to call for the record of any case if the Court by



which the case was decided appears to have acted in the exercise of a jurisdiction not vested in it by law, or to have failed to have exercised a jurisdiction vested in it, or to have exercised its jurisdiction illegally or with material irregularity, and further enables it to pass such an order in the case as the Court may think fit.

It will be observed that the section applies to jurisdiction alone, the irregular exercise, or non-exercise of it, or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved. And if the appellant's contention be correct, then if the civil Court should absolutely and whimsically decline to exercise its jurisdiction and refuse to make any orders as to the filling up of vacancies, no matter how many existed, there would not, in a case such as the present, be any remedy available under this section and no appeal would lie.

The act of the District Court complained of in the present case was an adjudication by it that the present appellant having been elected in pursuance of an order of the Court was a member of the committee. The words of the statute are: "And whoever shall be then elected under the said rules shall be a member of the Committee to fill such vacancy." If the election be valid and regular, the person elected becomes a member of the committee without any consent or approval being given by the District Court. It is contended, however, that the making of this order, necessarily involving, as it does, the construction of the statute—a pure matter of law—is not a judicial, but merely an administrative or ministerial act. A key, it would appear to their Lordships, as to the true position of the civil Court under this 10th section may be found by referring to the position it occupies under the immediately preceding and some of the succeeding sections of the Act. Section 9 provides that every member of a committee appointed under sections 7 and 8 shall hold office for life unless removed for misconduct or unfitness, and no such member shall be removed except by order of the civil Court. Surely in such a question as the removal of an officer from his office for misconduct or unfitness, the Court which makes the order removing him is exercising judicial functions? Any order made in such a matter in disregard of the requirements of natural justice, such, for instance, as proceeding without giving the member sought to be removed notice, or affording him an opportunity of defending himself, would clearly be voidable or void.

Again, under section 14, any person may sue in this civil Court

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the manager or superintendent of the mosque or the members of this very committee for breach of trust or misfeasance. And the Court might decree specific performance of any acts to be done by either of these functionaries, might award damages against him, or might remove him from office. Under section 16 the Court, in a suit pending before it, might refer the matter to arbitration.

It appears to their Lordships to be clear that in all these matters the civil Court exercises its powers as a Court of law, not merely as a *persona designata* whose determinations are not to be treated as judgments of a legal tribunal.

It was next contended that the matter of the four petitions in which the order of the 19th July, 1913, did not constitute a "case" within the meaning of the 115th section of the Code of Civil Procedure. No definition is to be found in the Code of the word "case." It cannot, in their Lordships' view, be confined to a litigation in which there is a plaintiff who seeks to obtain particular relief in damages or otherwise against a defendant who is before the Court. It must, they think, include an *ex parte* application, such as that made in this case, praying that persons in the position of trustees or officials should perform their trust or discharge their official duties. Their Lordships concur, therefore, with the High Court in thinking that the matter adjudicated upon was a case within the meaning of the 115th section of the Code.

The case of *Meenakshi Naidoo v. Subramaniya Sastri* (1) decided by this Board, is wholly different from the present. There the District Judge had, under this section 10, by his order appointed the appellant to fill a vacancy in the Temple Committee. An appeal was taken from this order, on the ground of the appellant's unfitness for the post by reason of his religious belief. The question of the jurisdiction of the civil Court to make the order was not raised. It was not pretended that a right of appeal—which, if given at all, must be given by statute—was given by Act XX of 1863; but it was contended that it was given by the 540th section of Act X of 1877, which gives a general right of appeal from decrees of Courts exercising original jurisdiction. The definition of the word "decree" given in this Act is modified by Act XII of 1879, and, as modified, runs as follows:—

"Decree" means a formal expression of an adjudication upon any right, claim, or defence set up in a civil Court where such adjudication decides the suit or the appeal."

Well, it is obvious that an order made by the Civil Court on an

(1) (1887) L. R. 14 I. A. 160.

application which may be made by "any person whatever," appointing a particular man to fill a vacancy on a committee, is not a "decree" within the meaning of this definition. The Board, on that occasion, carefully abstained from expressing any opinion upon the question whether proceedings, somewhat in the nature of *quo warranto*, could be taken to remove a person improperly appointed.

On the point of substance on the merits it was next contended that when a vacancy amongst the members of a committee occurs the statute imposes upon the remaining members a statutory duty to hold, within three months from the date of the vacancy, an election in the manner provided by the rules for the choice of a new member to fill this vacancy, and that if these members fail to discharge this statutory duty the jurisdiction of the Court is in the first instance confined to either itself appointing a person to fill the vacancy, or to making an order, somewhat in the nature of a mandamus, to compel them to perform their statutory duty. Well, in the first place it is admitted that the section does not expressly provide anything of the kind, and in the next place some of its provisions make it impossible to imply anything of the kind.

In the case of an election, public notice must be given as soon as possible after the occurrence of the vacancy, and the election must be held within three months after that date; but the order of the Court requiring the remaining members of the committee to forthwith fill up the vacancy may not be made till long after this period of three months has elapsed. It would in such a case be impossible to fulfil the statutory condition as to the time for holding the election. Again, the order is to be to the effect that these members shall forthwith fill up the vacancy, which seems to exclude all the delays contemplated where an election is held; and again where an election is held the remaining members of the committee merely act as the returning officer. They do not in any sense fill up the vacancy. The electors elect a person to be the new member, and upon his election by them he, according to the statute, "shall be a member of the Committee to fill the vacancy." If in such a case the vacancy can properly be said to be filled up by anybody, it is by the electors rather than by the remaining members of the Committee that this is done, whereas the order to be made in case of their default contemplates, and indeed directs, that these members themselves are to fill up the vacancy. The filling of it up is to be their act. It is to be done by them forthwith, without the aid or intervention of any electors

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or other persons, and it would appear to their Lordships it must be an act kindred in character to that which the Court itself may do, namely, appoint a person to fill the vacancy. It was also urged that if this construction of the section be adopted it would enable the remaining members of the committee, by their own default, practically to disfranchise the electors, and at the discretion of the Court possibly procure the patronage for themselves. That no doubt is so, and before a legislative body empowered to amend the statute, it might furnish a powerful argument for its amendment; but the function of this Board is to declare the law, not to alter it, and the argument cannot therefore here avail. In addition it is to be remembered that where the civil Court appoints, the electors are by and through the same default of the same members of the committee equally disfranchised, yet that is expressly authorised by the statute. The Court must be trusted not to confer upon these members by its order the power to appoint where the nature and circumstances of their default show that they are unworthy of being trusted with the privilege of appointing a member. Their Lordships are for these reasons of opinion that the decision appealed from was right, that the appeal fails and must be dismissed with costs, and they will humbly advise His Majesty accordingly.

*O. A. Cayley* :—Solicitor for the Appellant.

*Douglas Grant* :—Attorney for the Respondent.

J. M. P.

*Appeal dismissed.*

PRESENT: *Viscount Haldane, Lord Atkinson, Lord Shaw,  
Lord Parmoor and Mr. Ameer Ali.*

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[ON APPEAL FROM THE HIGH COURT OF JUDICATURE  
AT MADRAS.]

*Hindu Law—Mutt—Temple—Endowed property—Powers of alienation by a mahant or shebait—Necessity—Benefit to estate—Permanent lease of debottar lands—Permanent lease of a building site—Usage repugnant to the purpose of the endowment cannot be upheld—Existence of an ancient custom—A question of mixed law and fact.*

It is a breach of duty on the part of a shebait, unless constrained thereto by unavoidable necessity, to grant a lease in perpetuity of debottar lands at a fixed rent, however adequate that rent may be at the time, as the debottar estate is thereby deprived of the chance it would otherwise have of deriving benefit from the increment in value of the land. As to 'necessity' or 'benefit' to the estate: *Hunooman Persaud Panday v. Munraj Koonweree* (1); *Prosunno Kumari Debbya v. Golab Chand Baboo* (2) and *Konwur Doorgunath Roy v. Ram Chunder Sen* (3) discussed and explained: that it was impossible to define the term, but preservation of the estate from extinction, the defence against hostile litigation affecting it, the protection of it or portions from injury or deterioration by inundation, and such like things would be benefits.

*Held, accordingly*, that in consideration of a premium a permanent lease of a building site belonging to a temple by its shebait was invalid as against the grantor's successor.

*Sreemath Devasikamoney Pandara Sannadhi v. K. P. L. S. Palaniappa Chittiar* (4) affirmed. *Maharane Shidessuree Debia v. Mothuranath Acharji* (5); *Seena Peena Reena Mayandi v. Chokkalingam Pillay* (6) and *Abhiram Goswami v. Shyam Charan Nandi* (7) followed.

Property with which a temple is endowed should be used and its income applied for the particular religious or charitable purposes mentioned in the deed of endowment, if any, and in the absence of such a deed, the rules according to which such property and its income are to be dealt with in order to carry out the intention of the original endower can only be ascertained by inference from the practice proved by evidence to have been followed in the particular case.

(1) (1856) 6 M. L. A. 393; 18 W. R. 81 Note.

(2) (1875) L. R. 2 I. A. 145; 14 B. L. R. 450.

(3) (1876) L. R. 4 I. A. 52; 1 L. R. 2 Calc. 341.

(4) (1910) I. L. R. 34 Mad. 535.

(5) (1869) 13 M. L. A. 270 (275).

(6) (1904) L. R. 31 I. A. 83 (88); 1 L. R. 27 Mad. 291.

(7) (1909) L. R. 36 I. A. 148 (165); 1 L. R. 36 Calc. 1003; 10 C. L. J. 284.

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But these rules, so to be inferred, must not be inconsistent with or repugnant to the very nature and purpose of the endowment. If, for instance, the worship of the idol in the temple is intended to be perpetual, the preservation and use of the dedicated property to support and maintain that worship must be assumed to have been similarly intended to be perpetual; and consequently a rule which would authorise and empower a shebait of such a temple; arbitrarily, at his own mere will and pleasure to alienate the dedicated property, either bit by bit or *en bloc* could not be upheld. *Ram Parkash Das v. Anand Das* (1) relied on.

The existence of an ancient custom is a question of mixed law and fact.

Appeal against a decree of the Madras High Court, reversing a decree of the Additional Subordinate Judge of Madura and restoring a decree of the District Munsiff of Sivagunga.

The facts of the case sufficiently appear from their Lordships' judgment. The suit was brought by the respondent, as shebait of the Subramaniaswamy Devasthanam, to set aside a permanent lease of a building site belonging to the temple granted by his predecessor in consideration of a *musser* or premium at a fixed rent. The District Munsiff held that such alienation was absolutely beyond the competency of the shebait and decreed the suit. On appeal the Additional Subordinate Judge reversed this decision, holding that by local custom or usage the head of the temple could grant permanent leases for building purposes, and that the particular lease impeached was an act of prudent management. Respondent preferred a second appeal and the High Court (Wallis and Krishnaswami Aiyar, JJ.) restored the original decree (2).

February, 1892.

*De Gruyther, K. C., and Dube*, for the Appellants:—It is settled law that the possession and management of the property of the idol is vested in the shebait and that the shebait is empowered to do what is necessary for the benefit and preservation of the property. The authority of the shebait has always been held analogous to that of the manager for an infant heir—that was defined by Lord Justice Knight Bruce in *Hanooman Persaud Panday v. Must. Munraj Koonweree* (3): "It (the power of the manager) can only be exercised rightly in a case of need, or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make, in order to benefit the estate, the *bona fide* lender is not affected by the precedent mismanagement of the estate." The test was either *necessity* or *benefit*. In either case the charge or alienation or grant would be binding on the estate of the

(1) (1916) L. R. 43 I. A. 73 (78); I. L. R. 43 Calc. 707; 24 C. L. J. 116.

(2) (1910) I. L. R. 34 Mad. 535.

(3) (1856) 6 M. I. A. 393 (423).

idol. Reliance was placed on *Prosunno Kumari v. Golab Chand* (1); *Konwar Doorganath v. Ram Chunder* (2). The permanent lease here was not an alienation. It was grant on certain terms for a charitable purpose. The mahant granted the lease after a very careful consideration of all the circumstances. It was an act of most reasonable and prudent management on his part, and comes well within the principle laid down in *Hanooman Persaud Panday's* case (3). The building site in the village was not likely to be more productive, and it would be difficult for the mahant to obtain better rent. The best rent was paid, as was apparent from the capitalized value which when invested would bring in an income at the rate of 10 per cent. per annum. The grant of a permanent lease was practically the only method of leasing in India. Leaseholds similar to those prevailing in England were unknown in the Mofussil. Having regard to all the circumstances of the case the permanent lease was for the benefit of the estate of the idol, and was binding on the plaintiff.

The High Court was in error in holding that in merely granting a permanent lease the mahant is guilty of a breach of trust. Reference was made to the following: *Maharanees Shibessuree Debi v. Mothuranath* (4); *Seena Peena Reena Mayandi Chettiyyar v. Chokkalingam Pillay* (5); *Abhiram Goswami v. Shyama Charan Nandi* (6) and *Vidyapurna T. Swami v. Vidyaniidhi T. Swami* (7).

Each *matham* is regulated by its own rules of foundation or usage. The power of the mahant depends upon the rules of foundation of the particular *mutt*. In the absence of written rules of foundation the Courts ought to be guided by the practice and usage of the *mutt*. The Munsiff had found upon the evidence that it was customary for the mohunts to grant permanent leases. From that practice it ought to be inferred that the granting of permanent leases by the mohunt was warranted by the original rules of the foundation. The Munsiff's finding was a finding of fact, and it was affirmed on appeal by the Subordinate Judge. It was therefore final under section 100 of the Code of Civil Procedure, 1908: *Musammam Durga Choudhrain v. Jawahir Singh Choudri* (8).

(1) (1875) L. R. 2 I. A. 145 (151); 14 B. L. R. 450.

(2) (1876) L. R. 4 I. A. 52 (63); 1 L. R. 2 Calc. 341.

(3) (1856) 6 M. I. A. 393.

(4) (1869) 13 M. I. A. 270 (273); 13 W. R. P. C. 18.

(5) (1904) L. R. 31 I. A. 83 (88); 1 L. R. 27 Mad. 291.

(6) (1905) L. R. 36 I. A. 148 (165); 1 L. R. 36 Calc. 1003; 10 C. L. J. 284.

(7) (1904) 1 L. R. 27 Mad. 435.

(8) (1890) L. R. 17 I. A. 122 (127); 1 L. R. 18 Calc. 23.

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Reference was also made to *Sammantha Pandara v. Sellappa Chetti* (1) and *Ram Parkash Das v. Anand Das* (2).

In any case section 51 of the Transfer of Property Act, applies, and the plaintiff ought to be made to pay compensation to the defendants for the buildings erected on the land.

*Sir Erle Richards K. C.*, and *Kenworthy Brown*, for the Respondents, were not heard.

The judgment of their Lordships was delivered by

*March, 22.*

**Lord Atkinson** :—This is an appeal against a decree of the High Court of Judicature at Madras, dated the 18th October, 1910, which reversed a decree dated the 10th August, 1908, of the Additional Subordinate Judge of Madura, and restored that dated the 30th June, 1906, of the District Munsiff of Sivagunga, pronounced in the original suit No. 10 of 1905.

In the village of Kunnakuddy, in this district of Madura, there are several Hindu temples; one of these, styled the Subramanisawamy Devasthanam, has been endowed, for the religious service of the idol, with certain lands in and about this village, including a building site situate in one of the streets of the village, upon which site, in and previous to the year 1897, some ruins stood. The shebait of this temple is represented by the respondent. Should the property, the subject of such an endowment as this, have been formally dedicated to the Deity or the idol for worship in the temple by a deed of endowment it would presumably contain directions as to the mode in which the property is to be used, and its income applied for the particular religious or charitable purposes mentioned in the instrument. But where, as in the present case, no deed of this kind is forthcoming, the rules according to which the property and its income are to be dealt with in order to carry out the intention of the original endower can only be ascertained by inference from the practice proved by evidence to have been followed in the particular case, *Ram Parkash Das v. Anand Das* (2). But these rules, so to be inferred, must not in their Lordships' view be inconsistent with or repugnant to the very nature and purpose of the endowment. If, for instance, the worship of the idol in the temple be intended to be perpetual, as it could hardly fail to be, then the preservation and use of the dedicated property to support and maintain that worship must, they think, be assumed to have

(1) (1879) I. L. R. 2 Mad. 175 (179).

(2) (1916) L. R. 43 I. A. 73 (77); I. L. R. 43 Calc. 707; 24 C. L. J. 116.



been similarly intended to be perpetual. A rule, therefore, which would authorise and empower the shebait of such a temple, arbitrarily, at his own mere will and pleasure to alienate the dedicated property, either bit by bit or *en bloc*, would be so repugnant to the whole purpose and object of the endowment that it could not, in their view, be rationally held to embody the intention of the original endower.

In the year 1897 no rent was received out of this site ; the ruins upon it had become a nuisance. Proceedings before the Magistrate to abate the nuisance were either pending or about to be taken. It would, according to the report of one of the shebait officers, have cost more than 200 rupees to have had the site walled round so as to prevent access to it by the public. In that state of things K. P. L. S. Palaniappa Chetty, one of the appellants, on the 6th April, 1897, applied to the then shebait for the grant of a perpetual *cowle* of this site at the rent of rupees 1-8-0 per annum for the purpose of erecting thereon buildings for an Annathanam Mutt. Other offers were apparently made for the acquisition of the site. They were, no doubt, considered by the existing shebait, and his advisers ; but on the 14th April, 1897, a perpetual *cowle* was, in consideration of the sum of rupees 93-12-0 paid as a premium, granted to the two appellants for the purpose of erecting buildings thereon "for the said Annathanam Matam Charity." The charity contemplated was the erection of a kind of rest house for pilgrims passing through the village, irrespective of the consideration from whence they came or where they were proceeding to, and equally irrespective of whether or not they worshipped in the temple, or desired so to do, or contributed in any way to its maintenance. It was, therefore, a charity not in any sense subsidiary to or connected with the temple or the religious services performed therein, but was an entirely separate and independent charity, of a wholly different kind and character, to the support or maintenance of which none of the dedicated property or its produce could as an act of charity be legitimately applied.

The suit out of which this appeal has arisen was instituted by the respondent, the present shebait, against the appellants impeaching the *cowle* so granted to them by his predecessor, and praying that, amongst other things, it might be declared to be invalid as being, in effect if not in form, an alienation of the absolute interest in a portion of the immovable property dedicated to the services of the temple, for the purposes of an alien charity ; and further praying that the appellants might be directed to demolish all the

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building erected by them upon this site, to remove all materials from it, to restore it to its original condition, and to deliver up possession of it when so restored to the respondent. In the Courts in India the appellants made the case that they had acquired this site in the year 1880 from one Samier, and that it was not the property of this mutt at all. That case was found by these tribunals to be false. Having regard to the documents proved in evidence, it could not well be found to be otherwise. That case was not put forward in argument on this appeal, so that the main question for the decision of the Board is whether the perpetual grant made by this *cowle* of the 14th April, 1897, was, having regard to the evidence given in the case and the findings of the Munsiff and the Subordinate Judge thereon as against the respondent, a valid disposition of the described portion of the immovable property of this mutt. Their Lordships did not understand Mr. De Gruyther to contend on behalf of the appellants that the shebait of the temple, such as that in this case, has, by virtue of his office, an absolute and unrestricted power to alienate the immovable property with which the temple is endowed, arbitrarily at his own will and pleasure, under any or all circumstances. His contention, as their Lordships understood it, was this: that the shebait was not the owner of these lands, but stood towards them in a relation somewhat similar to that in which the guardian of an infant stands to the lands of the infant, and had similar powers of management and control; and that, accordingly, the shebait has power and authority to alienate the lands in cases of necessity or for the benefit of the estate of the mutt, and also power to carve derivative interests out of them. In support of this contention he cited the three following authorities amongst others: *Hunooman Persaud Panday v. Munraj Koonweree* (1); *Prosunno Kumari Debya v. Golab Chand Baboo* (2); and *Konwur Doorganath Roy v. Ram Chunder Sen and others* (3).

It is necessary in order to ascertain the sense in which such general and elastic terms as "necessity" and "benefit of the estate" were used in these authorities to examine the facts in reference to which the terms were used. In the first case a certain mortgage executed by a Ranees in her character, as was found, of the guardian of her infant son and manager of his estates, was impeached. By it these estates were charged with the payment of a debt due by the deceased father of the infant to the mortgagee, and already secured upon the property; and also charged with the payment

(1) (1856) 6 M. L. A. 393. (2) (1875) L. R. 2 I. A. 145; 14 B. L. R. 450.

(3) (1876) L. R. 4 I. A. 52; I. L. R. 52 Calc. 341.

of a sum advanced by the mortgagee to be applied in payment of the arrears of revenue due to the Government in respect of these estates, and thus save them from sequestration. There was no suggestion that the debt of the infant's father was contracted for illegal or immoral purposes. It was not disputed that according to Hindu law a son is bound to pay his father's debts if not of this character, and that the ancestral property descending to the son may be charged by him with payment of them. Well, it is clear that no greater benefit could well be conferred upon an estate than to save it from extinction by sequestration, the payment of the arrears of revenue by the mortgagee was therefore in the nature of salvage expenditure. The case was not finally decided by the Board. It was sent back to the Court below for further enquiry on some of the many points raised; but to prevent a further miscarriage Lord Justice Knight Bruce thought it right to state the general principles to be applied to its final decision. His words so much relied upon, reported at p. 423, run as follows:—

“The power of the manager for an infant heir to charge an estate not his own is under the Hindu law a limited and qualified power. It can only be exercised rightly in a case of need or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make in order to benefit the estate the *bona fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it in the particular instance, is the thing to be regarded.”

He continues at p. 424:—

“Their Lordships think that the lender is bound to enquire into the necessities for the loan, and to satisfy himself, as well as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. But they think that, if he does so enquire and acts honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge, and they do not think that under such circumstances he is bound to see to the application of the money.”

In that particular case in reference to which this language was used the “necessity” for the loan would appear to be plain and imperative, the benefit to the estate, the preservation of its existence, obvious. Moreover, the transaction impeached was not an absolute alienation of property, but merely a pledge of it which might at any time be redeemed. The case in no way resembles the present case.

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In the second case the Rajah Baboo, the shebait of an idol, a man of profligate habits, having spent the income of the debottar property on his own pleasures, borrowed a sum of 4,000 rupees from the respondent, and, by a bond and razhinama, pledged the debottar property for the payment of this sum. In both these securities it was stated that the money was borrowed for the services of the idol and the expenses of the temple. The Zillah Judge before whom the case was tried held as a fact that the money had been borrowed and expended for these purposes. Two decrees were obtained by the respondent, the lender, against the shebait, each directing that the debt should be paid by the shebait personally, or else be realised out of the profits of the debottar land. The appellant, the successor in office of Rajah Baboo, instituted a suit to set aside these decrees and have the debottar property released from an attachment issued in execution of them. The point decided was that the decrees, being untainted by fraud or collusion, and having been passed after the necessary and proper issues had been raised and determined, had the force of judgments of a competent Court, and were binding on the appellant, the succeeding shebait, who was a continuing representative of the idol's property. Though the question was not raised whether the debottar lands themselves could be sold under the above-mentioned decrees, the passage from the judgment of Knight Bruce, L. J., above extracted, was quoted, and some observations were made by Sir Montague E. Smith, who delivered the judgment of the Board, touching the alienability of debottar land, which have been relied upon. First, the learned Judge said :—

"There is no doubt that as a general rule of Hindu Law property given for the maintenance of religious worship and of charities connected with it is inalienable," and then after quoting a passage from the judgment of Lord Chelmsford in a case to be presently referred to, he, at page 151, proceeds thus :—

"But notwithstanding that property devoted to religious purposes is, as a rule, inalienable, it is in their Lordships' opinion competent for the Shebait of property dedicated to the worship of an idol, in the capacity as Shebait and manager of the estate to incur debts and borrow money for the proper expenses of keeping up the religious worship, repairing the temples or other possessions of the idol, defending hostile litigious attacks and other like objects. The power however to incur such debts must be measured by the existing necessity for incurring them. The authority of the Shebait of an idol's estate would appear to be in this respect analogous to that of

the manager for an infant heir as defined in a judgment of this Committee delivered by Lord Justice Knight Bruce."

On the next page he adds :—

"It is only in an ideal sense that property can be said to belong to an idol ; the possession and management of it must, in the nature of things, be entrusted to some person as Shebait or manager. It would seem to follow that the person so entrusted must of necessity be empowered to do whatever may be required for the service of the idol and for the benefit and preservation of its property at least to as great a degree as the manager of an infant heir. If this were not so the estate of the idol might be destroyed or wasted and its worship discontinued for want of the necessary funds to preserve and maintain them."

In the last case the grandmother of the appellant executed a mokurrari pottah to a certain person, predecessor in title of the respondents, of certain lands, receiving a premium of 1,900 rupees and reserving the substantial rent of 325 rupees per month. She subsequently, by an instrument styled in the judgment a bill of sale, in consideration of the sum of 1,700 rupees, conveyed to a person therein named 300 rupees per month, portion of the rent so reserved. In the first of these documents it is in effect stated that the temple named was out of repair and the premium paid was required by the grantor to put it into repair, and to procure various other things requisite for the service of the idol. And in the second it was stated that the Ranee, the grantor, had, "agreeably to the instructions of her late husband, commenced to build certain temples named in the deed and others, but being in want of funds was unable to carry out her husband's instructions." The suit was brought to have these instruments set aside, on the ground that the land alienated was debottar property.

Whether it was so or not was the main issue in the case. It was held by this Board that it was not debottar property at all. No proof whatever was given that the statements contained in the deeds were true in fact, and the observations contained in the judgment of the Board at pages 62 and 64 of the report are based upon the suppositions that the land granted was in fact debottar land and that the aforesaid statements were in fact true. On these assumptions the alienations were considered to be justifiable. At page 64 of the report the following passage will be found :—

"Here it cannot be said the grant of a mokurrari pottah was an improvident way of raising money, if it were necessary to do it at all. It still left a rent for the sustentation of the idol, and if the

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transaction be *bona fide* the subsequent sale of part of the rent was justified by the imperious necessity of finishing the temple which had been commenced."

So that the only specific point touching the present case actually decided in these three authorities was this, that a debottar estate may be mortgaged to secure the repayment of money borrowed and applied to prevent its own extinction by sequestration. No indication is to be found in any of them as to what is, in this connection, the precise nature of the things to be included under the description "Benefit to the Estate." It is impossible, their Lordships think, to give a precise definition of it applicable to all cases, and they do not attempt to do so. The preservation, however, of the estate from extinction, the defence against hostile litigation affecting it, the protection of it or portions from injury or deterioration by inundation, these and such like things would obviously be benefits. The difficulty is to draw the line as to what are, in this connection, to be taken as benefits and what not. Three authorities have been cited which establish that it is a breach of duty on the part of a shebait, unless constrained thereto by unavoidable necessity, to grant a lease in perpetuity of debottar lands at a fixed rent, however adequate that rent may be at the time of granting, by reason of the fact that by this means the debottar estate is deprived of the chance it would have if the rent were variable, of deriving benefit from the enhancement in value in the future of the lands leased. These authorities are *Maharanees Shibessuree Debia v. Mothooranath Acharji* (1), *Seena Peena Reena Mayandi v. Chokkilongam Pillay and others* (2); *Abhiram Goswami and Another v. Shyama Charan Nandi and Others* (3).

No doubt these cases dealt with agricultural lands, but no reason can be suggested why the principles they establish should not apply to a building site situate in the street of a village, as is the site in the present case. It may appreciate in value just as the land may. Moreover, if for the reasons above mentioned the grant of a lease in perpetuity of debottar lands at a fixed rent requires to be justified by unavoidable necessity, it is difficult to see why an absolute alienation in perpetuity of the same kind of land in consideration of a premium should not equally require to be justified by the same kind of necessity, since it brings about quite as completely the same prejudicial results. It has been urged on behalf of the appellants that the premium of rupees 93-12-0 if lent or invested at

(1) (1869) 13 M. I. A. 270 (275).

(2) (1904) L. R. 31 I. A. 83 (88).

(3) (1905) L. R. 36 I. A. 148 (165).

interest in India would bring in an income of 10 rupees per annum ; that a rent of 10 rupees per annum would be quite an adequate rent for this site ; that the *cowle* of the 14th of April, 1897, must therefore be regarded as a grant in consideration of a sum equal to the capitalised value of this adequate rent, and that the charity will therefore be benefited by a transaction which put at the shebait's disposal a sum capable of being so profitably used. But attractive and lucrative as money-lending may be in India, it is needless to point out that a shebait would not be justified in selling debottar land solely for the purpose of getting capital to embark in the money-lending business. And no authority has been cited giving any countenance to the notion that a shebait is entitled to sell debottar lands solely for the purpose of so investing the price of it as to bring in an income larger than that derived from the probably safer and certainly more stable property, the debottar land itself.

So much for the "benefit to the estate" of the charity alleged to result from this transaction. Next, as to the imperative necessity constraining the shebait to enter into it. There is not a suggestion that he needed this sum of Rs. 93-12-0 for any of the purposes of the charity he managed. Neither is there any proof that any effort was made to lease this site for a term, or even grant it in perpetuity, at a variable rent.

From the letter of the first appellant, dated the 6th April, 1897, it would appear that he was quite willing to pay an annual rent for it. No doubt the rent offered was very small, apparently because he bound himself to use the building to be erected for an Annathanam mutt. But as that was a charity separate and distinct from, and unconnected with, the temple and the worship of its idol, this obligation could not furnish any proper ground for accepting from him a lesser rent or a smaller premium than should be demanded from one not so bound, because a shebait is not entitled to alienate part of the endowment of his own charity to enrich another and altogether separate and alien charity. The grant of the *cowle* may have been an easy and convenient way of getting the nuisance upon the site abated ; but in their Lordships' view the evidence does not establish that the shebait was constrained by any necessity (as that term is in such a connection understood) to make this grant, or that any benefit accrued to the charity estate from the making of it. If the matter stood thus, their Lordships would be clearly of opinion that the *cowle* was, as against the successor in office of the grantor, invalid, and that the appeal must fail.

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It is contended, however, that the Munsiff has found that there prevails in this village, and presumably in the surrounding district, at all events in this village, a local custom authorising and empowering a shebait to do as against his successor what the ordinary law, as settled by the above-quoted authorities say he cannot legally do, namely, alienate debottar lands at a fixed rent or in consideration of a premium, whether he be constrained so to do by some necessity or the contrary, and whether the alienation be a benefit to the debottar estate or not. This is a custom entirely modifying the law. Their Lordships are of opinion that no such custom has been established here.

It has, however, been pressed on behalf of the appellants that there are two findings: one by the Munsiff, and one by the Subordinate Judge, who agrees with him that the ancient custom relied upon has been proved, and that, as that is an issue of fact, it must be accepted. No doubt two findings upon questions of pure fact must be accepted by this Board, but questions of the existence of an ancient custom are generally questions of mixed law and fact; the Judge first finding what were the things actually done in alleged pursuance of custom, and then determining whether these facts so found satisfy the requirements of the law. This latter is a question of law—not fact. The second answer is that neither of these Judges has found that any ancient custom such as modifies the law existed in this locality. The Munsiff sets out, at page 212 of the record, the finding he arrived at in these words:—

“I must find that for a very long time permanent leases of temple land are being granted, and that the alienees are in undisputed possession thereof.”

The Subordinate Judge, at page 230, states his finding in these words:—

“If custom were needed to justify such a grant, the District Munsiff has found upon the evidence (and I agree in his finding) that such local usage does obtain in the village in question. The custom is perfectly reasonable, and is not opposed to public policy.”

There could scarcely be a more glaring instance of the misapplication of the word custom, or a more remarkable instance of forgetfulness of essentials of a custom which modifies the ordinary law.

Their Lordships are clearly of opinion on all the points raised that the decision appealed from was right and should be affirmed,



and this appeal be dismissed ; and they will humbly address His Majesty accordingly.

The appellants must pay the costs here and below.

*Douglas Grant* :—Solicitor for the Appellant.

*Chapman Walker & Shephard* :—Solicitors for the Respondent.

J. M. P.

*Appeal dismissed.*

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PRESENT :—*Lord Parker of Waddington, Lord Sumner, Sir John Edge and Sir Lawrence Jenkins.*

RAJA MOHAMMAD ABUL HUSAN KHAN

v.

PRAG AND OTHERS.

AND

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v.

RAM PARGASH.

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[ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER  
OF OUDH.]

*Oudh Rent Act (XXII of 1886)—Oudh Rent Act, Amendment Act (No. III of 1901)—Jurisdiction—Revenue Court—Civil Court—Proprietor—Tenant—Ejectment—Proprietary and Under-proprietary right—Declaration that the holder of lands is merely a tenant—Cause of action.*

In Oudh, in cases to which the Oudh Rent Act (Amendment Act) applies, the Court of revenue has the exclusive jurisdiction to determine what is the status of a tenant of lands, and what are the special or other terms on which such tenant holds, and the civil Court has the exclusive jurisdiction to decide whether or not a person in possession of lands holds a proprietary or an under-proprietary right in the lands.

In a suit by the plaintiff, whose title as proprietor of a village within the meaning of that term in the Oudh Rent Act, and the Oudh Rent Act, Amendment Act was not distinguished, against the holder of the village for a decree for the proprietary possession thereof and for a declaration that the defendant had neither proprietary nor under-proprietary right therein, on proof that the defendant is merely a tenant the claim for decree for possession must be dismissed for want of jurisdiction, but the plaintiff is entitled to the declaration prayed for.

Where the revenue Court had decided that the holders of a village were in 1852 owners of zamindari rights in the village, that they had not lost those rights, that it must be presumed that they were not ordinary tenants, and that the proprietor of the village should prove in the civil Court that they were ordinary lessees, and the proprietor then brought a suit in the civil Court for a declaration

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that they had no proprietary right of the nature of a zamindari, superior or inferior, in the village, and also for a declaration that the decision of the revenue Court did not affect his rights:

*Held*, that the decision of the revenue Court, which was subsequently acted upon in the preparation of the Khewat of the village, made it necessary for the proprietor to bring the suit, and that the fact that the holders of the village did not in their written statement in the suit set up that they had any proprietary or under-proprietary right, did not disentitle the proprietor to the declarations which he claimed.

Two consolidated appeals from two judgments and decrees of the Court of the Judicial Commissioner at Oudh (Lindsay and Kanhaiya Lal J. Cs), dated 28th April, 1914, which reversed the judgments and decrees of the Subordinate Judge of Gonda. The appellant is admittedly the zamindar. He sued for among other reliefs a declaration that the defendants did not possess any proprietary or under-proprietary right in the villages held by them. The Subordinate Judge found for the plaintiff and made decrees giving the declaratory relief sought by the plaintiff. The Judicial Commissioners refused to make the declaration although they agreed with the Subordinate Judge that the defendants had no proprietary or under-proprietary rights. They were of opinion that the defendants were admittedly tenants and that the nature or terms of their tenancy could be determined by a revenue Court only and not by the civil Court. Hence these appeals, which were heard *ex parte*.

*L. De Gruyther, K. C.*, and *Dube* for the Appellants: Submitted that the plaintiff had a good cause of action for the suit, and that on the findings the appellate Court had erroneously refused to grant declaratory relief. The defendants had undoubtedly claimed under-proprietary rights but that claim had been negatived by the findings of the Court below. Reference was made to Act XXII of 1886, section 53 and to Act III of 1901, section 44. Their Lordships stopped counsel for the appellants in the course of argument and reserved judgment.

The Respondents did not appear.

The judgment of their Lordships was delivered by

**Sir John Edge** :—These are two consolidated appeals. The appellant in each of these appeals, Raja Mohammad Abul Husan Khan, is the plaintiff in the suit in which the appeal has arisen. The suits were brought to obtain the decision of the civil Court as to the status of the defendants in two villages in Oudh. The title of the plaintiff as proprietor within the meaning of that term in Act XXII of 1886 and Act III of 1901 was not in dispute in either suit.

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In one of these suits Ram Pargash is the defendant and in the appeal relating to that suit he is the respondent here. In the other suit Prag, Bhagwan Dat, and Suraj Bali were the defendants. Prag, Bhagwan Dat, and the representatives of Suraj Bali, who has died, are the respondents here in the appeal which relates to that suit.

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In the suit in which Ram Pargash is the defendant the plaintiff asked for a decree for the proprietary possession of Mouza Kauria Pirhia and for a declaration that Ram Pargash had no proprietary right and no under-proprietary right in that village. Ram Pargash claimed that he had an under-proprietary right in the village. The Subordinate Judge of Gonda, who tried the suit, found on the evidence that Ram Pargash had no proprietary or under-proprietary right in the village and was merely a tenant. On that finding the civil Court had no jurisdiction to give the plaintiff a decree for possession, and accordingly dismissed the suit, so far as the claim to eject the tenant was concerned, an ejectment of a tenant to whom Act III of 1890 applies being in Oudh exclusively within the jurisdiction of the Court of revenue. The Subordinate Judge rightly on his findings gave the plaintiff a decree on the 26th August, 1912, declaring that Ram Pargash had no proprietary or under-proprietary right in the village. That declaration the civil Court was competent to make, and it was necessary that it should be made by the civil Court, as the Court of revenue, holding that Ram Pargash had an under-proprietary right in the village, had declined jurisdiction in proceedings for the ejectment of Ram Pargash which the plaintiff had brought in the Court of revenue. The question as to whether Ram Pargash had or had not a proprietary or an under-proprietary right was one for the civil Court and when raised and persisted in was one which the Court of revenue could not finally decide.

From that decree of the 26th August, 1912, Ram Pargash appealed to the Court of the Judicial Commissioner of Oudh. The Court of Judicial Commissioner agreed with the Subordinate Judge that Ram Pargash had failed to prove that he had any proprietary or under-proprietary right in the village, and as their Lordships understand the judgment of the Court of the Judicial Commissioner, that Court held that Ram Pargash was a tenant, as alleged by the plaintiff, but for some reason which is not apparent, that Court declined to affirm the declaration which the Subordinate Judge had made, and by its decree of the 28th April, 1914, dismissed the suit. From that decree one of these appeals has been brought.

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The plaintiff was entitled to the declaration which had been made by the Subordinate Judge.

In the suit in which Prag, Bhagwan Dat, and Suraj Bali were the defendants, the plaintiff asked for a declaration that those defendants had no proprietary right of the nature of zamindari, superior or inferior, in mouza Mahadeo, and for a declaration that a decision of the Board of Revenue of the 25th March, 1897, did not affect his rights. That decision of the Board of Revenue was in effect that Prag, Bhagwan Dat and Suraj Bali were in 1852 owners of zamindari rights in the village; that there was nothing to show that they had ever lost their zamindari rights; that there was reasonable ground for presuming that they were not ordinary lessees; and that it was for Saiyid Ashgar Husain (the predecessor in title of plaintiff) to prove in the civil Court that they were ordinary lessees. In their written statement in this suit, Prag, Bhagwan Dat, and Suraj Bali alleged that they were perpetual Teekadars of the village; they did not set up any right to possession by virtue of any proprietary or under-proprietary rights; and they pleaded that the suit could not be maintained in a civil Court. As their Lordships understand the pleadings, the defendants were not by their written pleadings claiming to hold any proprietary or under-proprietary right in the village, or any position in the village other than that of tenants. But they had in 1896 filed objections in the Court of revenue, in reply to a notice of ejectment issued by the predecessor in title of the plaintiff, in which they claimed to be in possession of mouza Mahadeo as zamindars, and in this suit they tried to prove certain alleged acts of theirs which, if established, would tend to suggest that they held a proprietary right in the village. The Subordinate Judge of Gonda gave the plaintiff a decree on the 20th September, 1912, for the two declarations for which he had asked in his plaint.

From the decree of the 20th September, 1912, Prag, Bhagwan Dat, and Suraj Bali appealed to the Court of the Judicial Commissioner of Oudh. The Court of the Judicial Commissioner held that Prag, Bhagwan Dat, and Suraj Bali did not claim any proprietary or under-proprietary right in their written statement, and overlooking the fact that they had previously claimed to be zamindars of the village, and the fact that in the suit they had put forward evidence which tended to show that they held zamindari rights in the village, dismissed the suit on the 28th April, 1914. From that decree the other of these appeals has been brought.

It is clear that in Oudh, in cases to which Act III of 1901 applies, the Court of Revenue has the exclusive jurisdiction to determine what is the status of a tenant of lands, and what are the special or other terms upon which such tenant holds, and that the civil Courts have the exclusive jurisdiction to decide whether or not a person in possession of lands holds a proprietary or an under-proprietary right in the lands. The decision of the Board of Revenue of the 26th March, 1897, which was subsequently acted upon in the preparation of the Khawat of Mouza Mahadeo, made it necessary for the plaintiff to bring the suit to establish that Prag, Bhagwan Dat, and Suraj Bali had no proprietary or under-proprietary right in the village, and the fact that the defendants did not in their written statement in this suit set up that they had any proprietary or under-proprietary right, did not disentitle the plaintiff to the declarations which he claimed as against them and which the Subordinate Judge had rightly given to him.

Their Lordships will humbly advise His Majesty that these appeals should be allowed with costs, that the appeals to the Court of the Judicial Commissioner of Oudh should be dismissed with costs, and that the decrees of the Subordinate Judge of Gonda should be restored.

*Watkins and Hunter* :—Solicitors for the Appellants.

The Respondents did not appear.

J. M. P.

*Appeals allowed.*

PRESENT : *The Lord Chancellor (Lord Buckmaster), Lord Shaw, Lord Wrenbury and Mr. Amner Ali.*

MAUNG TUN THA

v.

MA THIT AND OTHERS.

[ON APPEAL FROM THE CHIEF COURT OF LOWER BURMA].

*Buddhist Law—Succession—Right of the eldest (aurasa) son to a fourth share on his father's death—Whether it is a vested right or a mere option—Period within which it may be asserted in Indian Limitation Act, (Act IX of 1908), Schedule I Art. 123.*

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In Burmese Buddhist Law the eldest (*aurasa*) son is on his father's death entitled to a definite one-fourth of the estate as against his mother and the other children, and so long as his mother lives, is at liberty to assert his right within the period allowed by article 123 of the Indian Limitation Act for a suit for a distribution of share of the property of an intestate.

Appeal from a decree of the Chief Court of Lower Burma dated March 31, 1915, reversing a decree of the District Court of Thaton.

U Tu a Burmese Buddhist died intestate on December 19, 1906, leaving him surviving the appellant Maung Tun Tha, his eldest or *aurasa* son, a widow Ma Thit (the first respondent) and various other children. For some years the widow Ma Thit managed his property, and was assisted in the management by the appellant. Thereafter disputes arose, and on June 26, 1913, Maung Tun Tha filed the present suit against the widow and other heirs of U Tu, claiming as *aurasa* son a quarter share in the estate, including therein the properties which had been acquired and added thereto by the joint exertions of himself and Ma Thit.

Defendants filed a written statement denying that plaintiff was an *aurasa* son and alleging that he had forfeited all right to inherit by his unfilial conduct. In paragraph 5 they alleged that if he even were entitled to a quarter share, he "exercised his election not to claim such share and cannot now do so."

The trial Court held on the evidence that plaintiff was the *aurasa* son of U Tu and forfeited his right as such by unfilial conduct. The trial Judge also held that plaintiff had under the Limitation Act, 12 years within which to sue and that he had not abandoned his right. He therefore decreed the suit.

On appeal the Chief Court (Ormond and Twomey JJ.) reversed this decision and dismissed the suit, on the ground that there had been unreasonable delay on the part of the plaintiff in asserting his right, or as they styled it, exercising his "option." The material part of their judgment is as follows:—

"In the present case we are not concerned with the period of limitation. If the plaintiff had demanded his quarter share promptly after his father's death and had been refused he would no doubt have 12 years from the date of his father's death to sue for the share. But though he was a married man with a family of his own and living apart from his mother when his father died he did nothing for  $6\frac{1}{2}$  years and the question we have to decide is whether he should not therefore be deemed to have abandoned his claim to partition and elected to wait for his mother's death and then

share with his brothers and sisters. It is not expressly provided in the Dhammathats that the eldest son must decide promptly which course he will take. But from the nature of the option it is necessary in the interests of the family that it should be exercised without delay. According as it is exercised or not the mode of managing the property must vary and the prospects of the other heirs would also vary. It can hardly be intended that a widow should be compelled to keep quarter of the estate tied up indefinitely on the chance that any time within 12 years the eldest son may demand his  $\frac{1}{4}$  share. Such a restriction would materially affect the widow's management of the estate. If such a course were admissible the eldest son might conceivably wait till  $\frac{3}{4}$  of the estate has through some misfortune been lost and then claim the whole of the remaining quarter to the entire exclusion of his brothers and sisters although they may have counted for years on coming in when their mother dies and sharing equally with the eldest son."

"We think that the right given to the eldest son (Manuke Book X section 5) of claiming a quarter share of the joint estate on his father's death must be exercised as soon as possible after that event and that if the option is not exercised without unreasonable delay it lapses altogether." Hence this appeal.

*L. De Gruyter K. C.*, and *E. D. Eddis* for the Appellant : Submitted that the Chief Court was wrong in holding that through not having sued for 6 years plaintiff had abandoned his claim to a quarter and could only come in with the other children on his mother's death.

Burmese Law is contained in the Dhammathats as to which see Lord Shaw's judgment in *Ma Hin Bwin v. U. Shwe Gon* (1). The principal Dhammathat is the Manuke which is followed in case of a conflict with others : but other Dhammathats are legitimate aids to interpreting it.

The rules of succession on the father's death are set out in section 30 of the Kun Win Mingyi's Digest, Vol 1. The right of the eldest son to a quarter share on his father's death is based on Manuke Book 10 rule 5. It has been held in Burma that on the father's death three-fourths vests absolutely in the mother and no child except the eldest son gets a separate definite share (Digest, section 34). It is now suggested that the eldest son does not get the remaining  $\frac{1}{4}$ th, but has only an option, which must be exercised promptly. There is no authority for such a proposition. The  $\frac{1}{4}$ th share vests in the eldest son by inheritance on his father's death,

(1) (1913) L. R. 41 I. A. 121 ; 20 C. L. J. 264 ; L. L. R. 41 Calc. 887.

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irrespective of any claim by him. Attathankhapa, section 155 (page 4 in the English translation) as to the authority of, which *vide* Chan Toon's Principles of Buddhist Law, P. 101.

(Lord Shaw asked if this proposition was disputed.)

(*Sir Erle Richards* : We say the eldest son only has a right to claim partition. If he claims partition, he is entitled to  $\frac{1}{4}$  : but he must exercise his option within a reasonable time).

Here plaintiff has sued after  $6\frac{1}{2}$  years. The Indian Limitation Act, article 123 gives him 12 years. The Chief Court say I must assert my right to get a title. I say I have one already. The law gives me a share, and how have I lost it?

(Lord Chancellor : The Chief Court's judgment does not deal with any point raised by the defence. The defence was that plaintiff had elected not to claim his share but I can find no evidence of any election not to take).

*Eddis* followed.

*Sir H. Erle Richards K. C.*, and *F. J. Coltman* for the Respondent. There is no joint family system in Burma. During the life-time of the parents they hold the property jointly, but on the death or remarriage of either or on the death of both rights to partition arise and can be exercised. This is quite different from the right to partition in India, which goes on from day to day.

I may say first that the eldest son must exercise his election—claim his right to partition—within a reasonable time: that he cannot lie by : and can drop his share by not claiming it : secondly, that his conduct in managing the family property shews that he acquiesced in the existing arrangement.

The eldest son's right is merely a right to claim partition. The judgment in *Ma On v. Ko Shwe O* (Ripley's Selected Judgments, 378) cited in Chan Toon, page 104, says "On the death of one of the parents the eldest son may claim." It is not every eldest son who inherits ; certain classes are excluded : and the right is distinctly put as a right to claim, not to get. At page 144 of Chan Toon it is laid down that the eldest child shares with the others on the death of both parents if he has not already obtained a division.

(*Eddis* referred to page 143).

At page 121 Chan Toon quotes a passage from the Attathankhapa, clearly contemplating that the eldest son who has not got his share shall come in with the others. Manuke Book 10 rule 12 uses the words "on demanding." Book 10 rule 14 clearly contemplates that the eldest son shall not take  $\frac{1}{4}$  share, but a different share calculated as there laid down,



The right of the eldest son to a special portion does not pass to his own heirs, but to the next eldest: this shows that it is not an ordinary right of inheritance: *Ma Mya Thu v. Maung Po Thin* (1). In *Ma Su v. Ma Tin* (2) the stripes of the eldest son took not one-fourth, but the same as any other child.

Lord Wrenbury: The only decision there, is that the grandchildren take *per stirpes*.

The period of limitation for claiming is laid down in section 51 of the Digest: it must be within 7 or 30 days after the funeral.

(Lord Shaw: You are not entitled to raise this. It is not in your defence, nor in the judgment of either of the lower Courts).

These rules have not statutory authority, but they show the ideas of the Buddhist community. There is a distinct provision in that section (page 103) that if the period of limitation is exceeded, the heir forfeits the right to claim it. Article 123 of the Limitation Act does not apply: this is not a claim for a distribution of share, but for partition. The eldest son has no vested right, but only a right to claim partition. He has two rights, he can claim partition now, or he can elect to claim it at his mother's death: he cannot let that state of things continue indefinitely, or for 12 years.

*Coltman* followed: The widow takes not by partition but by survivorship: so there is not necessarily a partition on the father's death. Rule 5 of the Manukye gives the eldest son the right to a quarter: rule 14 gives a right to all the sons on the mother's death. These passages have to be reconciled, and the most reasonable and just construction is to hold that the eldest son has an election, and must elect within a reasonable time. Here he wants mesne profits for 6 years.

(Lord Wrenbury. If the mother died within a fortnight would he lose his right?). Yes I think so.

(Lord Wrenbury: Then what becomes of the reasonable time?)

The fact that he may lose his right in such a contingency gives a motive to make haste.

No reply was called for.

Their Lordships' judgment was delivered by

The Lord Chancellor:—The appellant in this case is the plaintiff in certain proceedings which were instituted in the District Court at Thaton, by which he claimed to have one-fourth share of the estate of his father determined and allotted to him. The claim

(1) (1899) L. B. P. J. 585.

(2) (1912) 6 L. B. R. 77 (84).

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is stated quite clearly, and with commendable brevity, in the plaint, which sets out allegations which are no longer in dispute, namely, that the plaintiff was the eldest son of his father; that his father died on the 19th December, 1906, intestate, and left a widow and certain other sons and daughters him surviving.

The ground upon which that claim was resisted depended in the main upon an allegation that the plaintiff had behaved in an unfilial and illegal way, and, consequently, had forfeited his rights. That defence was disposed of by the learned Judge who heard the cause, who, although he appears to have been greatly embarrassed by the untrustworthiness of the evidence before him, decided that the defendant had not established this allegation.

The only other matter left for decision was one which, according to the defendants' contention, arose upon paragraph 5 of their defence. That paragraph suggested that the plaintiff had not in fact any share in the estate, but that, on the death of his father, he had obtained a right to elect whether he would have that share or no, and that, in the absence of election within a reasonable time, the claim could not now be brought forward. That view was supported by the chief Court, and from their decision this appeal has been brought.

The whole of that contention depends, as Mr. Colman very fairly stated, upon considering the two different rules of the Dama-that which are applicable to this case. They are rule 5 and rule 14. The first relates to the partition of an estate upon the death of the father, and it is under that rule, and, as their Lordships understand it, under that rule alone, that the right of the plaintiff in this case arises. It is in these words: "When the father has died the two laws for the partition of the inheritance between the mother and the sons are these: Let the eldest son have the riding horse" and certain ornaments, and it then proceeds: "Let the residue be divided into four parts, of which let the eldest son have one, and the mother and the younger children three."

It is said that rule 14, which deals with the division of the estate on the death of the mother, shows that, if the one-fourth had not been segregated, and paid over to the eldest son after the father's death, and before the mother died, there would be a different method of distribution, one that might be more favourable, or that might be more unfavourable, to the eldest son, but which, certainly, would not be the same as that to which he was entitled under rule 5.

Their Lordships do not think that it is desirable to express an opinion upon the true construction of rule 14. It is a matter that

may arise for determination hereafter, and its determination is not relevant to the present question because, even assuming in favour of the respondents, that the rights of the eldest son would change in the event of his not having segregated his one-fourth before his mother's death, it by no means follows that the right which he got under rule 5 was merely the right to elect within a certain limited period of time whether he would take the property or no. Their Lordships can find no ground whatever for the suggestion that he got anything under rule 5 excepting a definite one-fourth part of the estate, a right which he was at liberty to assert within any period that was not outside the period fixed by article 123 of the Indian Limitation Act as the period within which a claim must be made for a share of property on the death of an intestate.

The respondents have certainly urged before their Lordships all that could be urged in support of their view, but their Lordships find themselves quite unable to accept their arguments or to agree with the view which was formed by the chief Court in this matter.

Their Lordships will humbly advise His Majesty that this appeal should be allowed, the decree of the chief Court set aside with costs, and the decree of the District Court restored.

The respondents will pay the costs of the appeal.

*Sanderson Adkin Lee and Eddis* :—Solicitors for the Appellant.

*Arnould & Son* :—Solicitors for the Respondents.

J. M. P.

*Appeal allowed.*

PRESENT :—*The Lord Chancellor (Lord Buckmaster), Lord Atkinson, Lord Wrenbury and Mr. Ameer Ali.*

BEG

v.

ALLAH DITTA AND OTHERS.

[ON APPEAL FROM THE CHIEF COURT OF THE PUNJAB.]

*Punjab Customary Law—Succession—Mahomedan Jats belonging to the sub-community of Dabs—Daughter married to a collateral and residing with her husband in her father's house—Khana-damad—Agnates—Riwaj-i-am, evidentiary value of.*

Among the Mahomedan Jats belonging to the sub-community of Dabs settled in the Jhang district in the Southern Punjab, a daughter married to a

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collateral who takes up his abode in the father-in-law's house and is known as the *Khana-damad*, or resident son-in-law, succeeds, in default of male issue, to her father's inheritance to the exclusion of the agnates.

Entries in the *Riwaj-i-am* (or official records of custom), even though not supported by instances, form a strong piece of evidence in support of an alleged custom, and unless such evidence is rebutted the custom must be held to have been established.

*Ex parte* appeal from a decree of the chief Court of the Punjab, reversing a decree of the Divisional Judge of Shahpur.

The parties in this case were Dabs, a sub-tribe of Mahommedan Jats, settled in the Jhang District in the Southern Punjab. The property in dispute had belonged to Shahamad, who died leaving a widow and a daughter, Jindwadi, but no son. Jindwadi had married Daim, a collateral of Shahamad, and she and her husband resided with the latter. They had a son, the appellant Beg. On the widow's death Jindwadi got Beg's name registered as proprietor in the revenue Records.

Plaintiffs claimed from Beg one half of Shahamad's estate as his collaterals alleging a custom of agnatic succession by which daughters were excluded. It was admitted that Daim was entitled as a collateral to the other half.

Beg denied plaintiffs' right to succeed in the presence of his mother and himself, and alleged that his father Daim lived and worked with Shahamad. He alleged a custom by which a daughter married to a "*Khana-damadi*" or resident son-in-law was preferred to the agnates.

The District Judge found such custom proved by the *Riwaj-i-am* and dismissed the suit. The plaintiffs appealed to the Divisional Judge, who affirmed the District Judge's finding. They further appealed to the Chief Court, which remanded the case for findings on other matters, and when it again came before them reversed the decision of the lower Courts and decreed the suit, on the ground that the defendant had not proved the custom on which he relied. They took the view that a mere statement in the *Riwaj-i-am* not corroborated by instances was insufficient to establish a custom. The defendant thereupon appealed to His Majesty in Council.

*Sir Erle Richards, K, C.* and *O'Gorman*, for appellant. The custom for which we contend is set out in Rattigan's Digest of Customary Law, Chapter 2, para 23. The daughter succeeds in preference to collaterals, if she marries in the family, and still more if her husband is *Khana-damadi*. The *Riwaj-i-am* of the Jhang District prepared at the settlement of 1880 shows this custom as

prevailing among the Syals, of which the Dabs are a branch, but there is no evidence of any instances, and hence the Chief Court has held, that, we have not displaced the general custom of agnatic succession. In so holding they have followed their own rulings in Nos. 29, 89, and 108 of P. R. 1900 : but these cases are overruled by *Digambar Singh v. Ahmad Said Khan* (1).

The latter case dealt with the *Wajib-ul-arz*, and no doubt this ranks rather higher than the *Riwaj-i-am*, as it is part of the Record of Rights, and as such a statutory presumption in its favour is created by sections 31 and 44 of the Punjab Land Revenue Act, (Act XVII of 1887) : also, it is signed by the co-sharers. But the *Riwaj-i-am* is drawn up, under rules, by the same settlement officer : it is admittedly evidence, and is sufficient to shift the burden of proof upon the other side.

As to the alleged general custom of agnatic succession, up to 1872 the personal law prevailed in the Punjab, as elsewhere, in the absence of evidence of custom, but the Punjab Laws Act, (Act IV of 1872) section 5 (a) put custom first. In India generally the onus to show variation from personal law is on the person asserting such variation, but this is no longer so in the Punjab, where there is nothing like a common law or general custom, almost every proposition being over-laden with exceptions : Sir Charles Roe's Tribal Law in the Punjab, 1895, citing *Gujar v. Sham Das* (2).

The Chief Court base their finding of general custom as to agnatic succession upon decisions, but the decisions are inconsistent : *Mussammat Sabban v. Ghazi* (3), and *Emna v. Sajawat Khan* (4), are so far against the appellant that in each the Chief Court treated the onus as being on the daughter to show a variation from the custom they took to be in force : but in a case from an adjoining district, it was held that the daughter would have the right to succeed if she had married in the tribe : *Musammat Fakina v. Khanda* (5).

(The Lord Chancellor : The case actually decided that if she married outside she did not succeed.)

Even if it is assumed that there is a general rule excluding women, it can be displaced by the *Riwaj-i-am* : *Sheran v. Sharman* (6), the *Riwaj-i-am* was treated as good evidence in *Jindwaddi v. Hassan Shah* (7),

(1) (1914) L. R. 42 I. A. 10.

(2) 107 P. R. 1887.

(3) 50 P. R. 1885.

(4) 37 P. R. 1898.

(5) 25 P. R. 1895.

(6) 17 P. R. 1901.

(7) 41 P. R. 1895.

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Any presumption of general custom is easily shifted: *Sher Jang v. Ghulam Mahiddin* (1), reference was also made to *Rella v. Budha* (2), and *Bholi v. Fakir* (3).

The Respondents did not appear at the hearing.

The judgment of their Lordships was delivered by

**Mr. Ameer Ali.**—This is an appeal from a judgment and decree of the Chief Court of the Punjab, dated the 23rd of December, 1908, and arises out of a suit instituted by the plaintiffs, respondents, so long ago as the 4th April, 1900, in the Court of the Additional District Judge of Jhang, for possession of some landed property situated in that district.

The property in suit was owned and possessed by one Shahamad, a Mahomedan Jat, belonging to the sub-community of Dabs, settled in the Jhang district in Southern Punjab. Shahamad died many years ago, leaving a widow, Sahib Bibi, and a daughter named Jindwadi, who was married to a near cousin of the name of Daim. The defendant, appellant, is the son of Daim and Jindwadi. On Shahamad's death, his widow succeeded to his entire inheritance and remained in possession until her death, which is stated to have occurred a year before the litigation commenced. On the widow's death, Jindwadi, acting on behalf of her son, obtained an order from the Collector for the registration of his name in the revenue registers as proprietor in succession to Shahamad.

The plaintiffs claim to be the collaterals or agnetic relations of Shahamad, and as such entitled by the custom of their tribe or community to their share of his inheritance on the death of the widow, to the exclusion of his daughter and the daughter's son. The action, however, is confined to a moiety of Shahamad's estate, as it is admitted that Daim was also a collateral and entitled to a half.

The suit was brought against Beg, who was evidently an infant at the time, under the guardianship of his mother. He denied the plaintiff's title to the inheritance of Shahamad "in the presence of his daughter and grandson." He further alleged that Shahamad had executed a will under which also he was entitled to his grandfather's estate. He also stated that his father, Daim, lived and worked with Shahamad in his lifetime. It is unnecessary to refer to the earlier stages of the suit, which proved infructuous. The first adjudication on proper issues was made by the District Judge on

(1) 22 P. R. 1904.

(2) 50 P. R. 1903 F. B.

(3) 62 P. R. 1906.

the 20th December, 1902. The real controversy between the parties is clear from the issues framed by him and his judgment thereon.

It appears that whilst the plaintiffs based their claim to possession on a general custom of agnatic succession in their community or tribe, the defendant, without, so far as their Lordships can see, admitting the contention, alleged that a daughter married to a collateral who takes up his abode in the father-in-law's house and is known as the *Khanadamad*, or "resident son-in-law," succeeds to her father's inheritance to the exclusion of the agnates. And in support of this special custom he produced the *Riwaj-i-am*, or "official records of custom," in addition to a considerable amount of oral testimony.

Some of the issues were specifically directed to the respective contentions of the parties with regard to the custom. The District Judge in substance held that although there was a custom more or less general among the agriculturist tribes of the Punjab by which daughters were excluded from succession, the existence of another custom, by way of exception, was established by which married daughters residing with their husbands in the paternal house were not subject to the deprivation of the inheritance. He held also that the will set up by the defendant was proved. With regard to the custom alleged by the defendant, his conclusion is expressed in the following words:—

"Then the *Khanadamadi*" (the status of Daim as a resident son-in-law) "is proved; this is a recognised custom, that a daughter or her descendants get the inheritance in preference to the collaterals. The same is the result of the local commissioners' report and of the evidence of the witnesses for the defendant."

He thus found expressly in favour of the existence of the custom on the basis of which the defendant contended the plaintiffs must fail; and he accordingly dismissed the action.

From this judgment the plaintiffs appealed to the Divisional Judge, who affirmed the first Court's decree with a specific finding based on the *Riwaj-i-am* in accord with the District Judge. And he added that "nothing had been proved to contradict this custom"—the custom alleged by the defendant.

From this decision the plaintiffs preferred an appeal to the Chief Court. On this appeal the learned Judges held that the will propounded by the defendant was genuine and that Daim was, in fact, a *Khanadamad*; but they considered that the finding of the lower Courts was not sufficient for the disposal of the case and they accordingly remanded it for an enquiry as to whether the property

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left by Shahamad was ancestral or self-acquired, what his powers of disposition were, and so forth—questions, in their Lordships' opinion, wholly immaterial if the custom was established. The order of remand is dated the 16th November, 1905, and the appeal did not come on for further hearing until 1908.

After the remand the matter came before two different officers. The second District Judge, under the orders of the Divisional Judge (not the same Judge who had decided the first appeal), held an elaborate enquiry practically on the same points that had been already decided; his report came before the Divisional Judge, who also went over at considerable length the same ground.

He put aside the statements in the *Riwaj-i-am*, apparently on the ground that they required to be proved by instances before any value could be attached to them. With regard to the evidence of instances, he thought it referred, with one exception, to other sections of the community, and did not apply to the Dabs. The Divisional Judge further held, in agreement with his predecessor, that the plaintiffs had, on their side, failed to rebut the defendant's allegation as to the existence of a special custom relating to the succession of married daughters among the Dabs.

On the return of the case to the Chief Court the appeal was reheard by two Judges, one of whom was a party to the order for remand. The question was this time confined to the existence of the custom alleged by the defendant; and the learned Judges, being of opinion that the defendant had failed to establish his allegation, reversed the decision of the first Divisional Judge, dated the 3rd February, 1904, and decreed the plaintiffs' claim.

From this decree the defendant Beg has appealed to His Majesty in Council. Their Lordships cannot help thinking that, had it not been overlooked that the main issue in the case at which the lower Courts had arrived at a distinct finding related to the existence of the custom, twelve years' ruinous litigation might have been avoided. It may be observed here that the Judges who decided in favour of the existence of the custom alleged by the defendant appear to have correctly apprehended the incidence of the *onus*.

In their Lordships' opinion the Chief Court are in error in supposing that the defendant did not discharge the onus that lay on him of establishing the custom he alleged. Assuming that there is a general custom of agnatic or collateral succession in default of male issue to the exclusion of female heirs among the agricultural tribes of the Punjab, about which the decisions of the Punjab Chief



Court are by no means uniform, especially in the case of Mahomedan tribes who are endogamous, it is clear that the rule is admittedly subject to a considerable number of exceptions. Mr. Rattigan, in his valuable work called "A Digest of Civil Law for the Punjab," enumerates the exceptions under paragraph 23. Sir Charles Roe, himself at one time a Judge of the Chief Court, in his "Tribal Law in the Punjab," lays particular stress on the value of the *Riwaj-i-am* as a record of tribal customs; and, he adds, that "a son-in-law of the house is a regular institution."

In the *Riwaj-i-am* filed in this case the custom alleged by the defendands is mentioned in express terms as in force among the Syeds, Kureshis, and Syals. With regard to the general body of Jats (in which term the sub-community of Dabs is clearly included) the custom is simply mentioned as "that prevailing among the Syals."

The *Riwaj-i-am* was produced and exhibited as evidence at the very outset of the case; it is a public record prepared by a public officer in discharge of his duties, and under Government rules; it is clearly admissible in evidence to prove the facts therein entered subject to rebuttal. In their Lordships' opinion, the statements contained in the *Riwaj-i-am* form a strong piece of evidence in support of the custom, which it lay upon the plaintiffs to rebut, and this, according to the findings of the Divisional Judges, they failed to do.

In their Lordships' opinion, the decree of the Chief Court cannot be sustained, and they will humbly advise His Majesty that it should be set aside, and the plaintiffs' suit dismissed with costs in all the Courts in India. The respondents must pay the costs of this appeal.

*Ranken Ford, Ford and Chester* :—Solicitors for the Appellant.

*T. L. Wilson & Co.* :—Solicitors for the Respondents.

J. M. P.

*Appeal allowed.*

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PRESENT :—*Lord Shaw, Lord Parmoor and Mr. Ameer Ali.*

FATEH CHAND

v.

PANDIT RUP CHAND.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE FOR THE  
NORTH-WESTERN PROVINCES, ALLAHABAD].

*Will—Construction—Malik-o-qabiz—meaning of—Devise of whole estate to one person coupled with devise of a particular village to another—Repugnancy—Express conferment of powers of alienation upon general devise and omission of such power in case of particular devise—Whether such difference of language limits the interest of the particular devise.*

A testatrix described her title as "I am the sole owner in possession (*malik-o-qabiz*) of his (her deceased husband's) entire estate and possess all the proprietary powers" and bequeathed the entire estate of her husband to one Fateh Chand, with certain conditions, one of which was that "I shall continue to be the owner in possession of the entire estate the subject of the will and possess all powers such as those of making sales, mortgages &c.," and the condition was in the following terms, "I have bequeathed *Mausa Khudda*, with all the property to Musammat Gomi. After my death she shall be the owner in possession (*malik-o-qabiz*) of the entire property in *Mausa Khudda* aforesaid ;"—

*Held*, that the words "*malik-o-qabiz*" signify a full ownership in property ; that by condition 4 the village in question was absolutely bequeathed to Musammat Gomi ; that expressions as to powers of alienation by the testatrix neither abate from nor fortify the completeness of the ownership and possession of the testatrix, and, being words which are thus surplusage, should be omitted in construing condition 4 ; and that inasmuch as the entire estate devised to Fateh Chand was subject to conditions, an absolute gift of the village in question to another person was an exception but not repugnant to the bequest to Fateh Chand.

*Musammat Surajmani v. Rabi Nath Ojha* (1) approved and followed.

Consolidated Appeals from two decrees of the Allahabad High Court, dated the 5th February, 1913, varying a decree of the Court of the Subordinate Judge of Saharanpur, dated the 11th March, 1911.

The main question in this appeal was the construction of the will of Musammat Gomti Kunwar. The material clauses of the will were as follows :—

"1. Musammat Gomti Kunwar, widow of Lala Sri Kishun Das, rais of Chhapar and daughter of Lala Ganpat Rai, caste Mahajan, rais and resident of Saharanpur, declare as follows :—

Under the will of my husband I am the sole owner in possession of his entire estate and possess all the proprietary powers. I have

(1) (1907) L. R. 35 I. A. 17 ; 7 C. L. J. 131 ; I. L. R. 30 All. 84.

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no male or female issue, and life is uncertain and not everlasting. Hence, through foresight and with a view to avoid future troubles and disputes, I, in a sound state of body and mind, bequeath the entire estate of my husband to Fateh Chand, son of Lala Sri Ram Das, who is related to me as the son of my 'joth' (husband's elder brother) subject to the following conditions :—

2. So long as I live, I shall continue to be the owner in possession of the entire estate, the subject of the will, and possess all the powers, such as (those of) making sales mortgages, gifts, &c.

3. After my death, the said person (the legatee) shall become the owner in possession of the entire estate of my husband and he, too, shall possess all powers of alienation like myself.

4. I have bequeathed mauza Khudda, with all the property, to Musammat Gomi, the daughter of my priest (*purohit*) whose marriage was celebrated by my father-in-law and whom I have brought up as my own daughter. After my death, she shall be the owner in possession of the entire property in mauza Khudda aforesaid."

The suit was brought by the respondent, a purchaser from Musammat Gomi for possession of Mauza Khudda with mesne profits.

The Subordinate Judge held that there was a repugnancy in the general and particular devises, and that though the most obvious solution would be to treat the particular devise as an exception to the general bequest, it would be a "more enlightened" explanation to rely upon testatrix's use of a certain set of words by way of conferring an absolute estate on the general devisee Fateh Chand and her "significant omission" of such words in the case of the particular devisee Musammat Gomi. He held that on the true construction of the will Musammat Gomi took a life estate only and decreed the suit to the extent of such life interest.

Both parties appealed to the High Court, which delivered the following judgment :—

"This appeal is connected with the First Appeal No. 111 of 1911, in which we have just now delivered judgment. The question which is involved in this appeal is first whether a decree in favour of the plaintiff, Rup Chand, should be limited to an estate during the lifetime of Musammat Gomi, and secondly, whether the plaintiff should have mesne profits for the period anterior to the institution of the suit.

The first question depends upon the construction to be placed upon the will of Musammat Gomi. The will commences by recit-

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ing that the testatrix was entitled to all her husband's estate and that she, while in a sound state of body and mind, bequeathed the entire estate of her husband to Fateh Chand. Then occur these words, "I covenant in writing that I shall abide by the following conditions. Clause (2) and clause (4) are as follows: The other clauses are not material." After setting out the clauses, the judgment proceeded as follows:—

"The learned Subordinate Judge has, for reasons which he has given in his judgment, held that on the true construction of the will as a whole, Musammat Gomi only took an estate for her life. He lays a good deal of stress upon the words in clause (2) giving all powers of alienation to Fateh Chand and to the omission of words of the same nature in clause (4). He then goes on to say that by reading clause (4) 'as conferring merely a life estate, he can reconcile both clauses of the will.' We cannot agree with this view. Having regard to the recent ruling of their Lordships of the Privy Council, if clause (4) stood alone, we certainly would have to hold that Musammat Gomi took an absolute interest and not merely a life-interest.

We have then to see whether there is anything else in the will to lead us to believe that merely a life-interest was intended. The case cannot be put more forcibly than it was put by the learned Subordinate Judge. We, however, think that his reasoning is not quite complete, because interpreting clause (4) as giving merely a life-estate, would not reconcile the two clauses or give effect to clause (2). Clause (2) provides that, after the death of the testatrix, Fateh Chand should at once become the absolute owner in possession of the entire estate. It is impossible to reconcile this clause with clause (4), which undoubtedly gives at least a life-estate to Musammat Gomi. We are bound to consider each clause by itself, and we must hold that under clause (4) an absolute estate is conferred upon Musammat Gomi. There are no words in clause (4) or in any other part of the will save, as already mentioned, which could in any way limit the estate conferred upon Musammat Gomi to a mere life-estate.

The question of mesne profits has not been seriously pressed.

The result is that we set aside so much of the decree of the Court below as in any way limits the estate of the plaintiff in the property in dispute. We make no order as to the costs of this appeal. The appellant will have his full costs in the Court below."

The appellant then appealed to His Majesty in Council.

*De Gruyther K. C.*, (*J. M. Parikh* with him) for the Appellant :  
The substantial question in this appeal is the construction of Musammat Gombi's will. The true construction is that which the Subordinate Judge has placed upon it. The words *Malik-o-qabiz* in themselves no doubt denote absolute ownership: *Musammat Surajmani v. Rabi Nath Ojha* (1).

But these words are not conclusive that the devisee is to take an absolute estate: the instrument has to be looked at as a whole, and other parts of it negative that supposition. In a similar case *Punchoo Money Dossee v. Troyluckoe Mohine Dossee* (2) it was held that a widow of whom the same words were used took only a limited estate. In each case we must endeavour to ascertain what testator really intended.

[Lord Shaw referred to *Chuni Lal v. Bai Samrath* (3).]

*J. M. Parikh* followed.

*Sir W. Garth* and *Dub* for Respondents were not called upon.

Their Lordships' judgment was delivered by

**Lord Shaw**:—In these consolidated appeals it has been admitted in the argument submitted to the Board by the counsel for the appellant that substantially only one question falls now to be determined. That question has reference to the construction of a Will dated the 18th September, 1901, of one Musammat Gombi Kunwar. In that document there is a description of the title of the testatrix given in the following words: "I am the sole owner in possession of his [her husband's] entire estate and possess all the proprietary powers." Their Lordships note that throughout this will the term thus translated "sole owner in possession" or "owner in possession" is "*malik-o-qabiz*."

Having thus described the property she proceeds to bequeath "the entire estate of my husband to Fateh Chand." There is, however, appended to this bequest of the entire estate the subjection of the whole of the estate "to the following conditions," and a covenant in writing by herself that she would abide by those conditions. One of those conditions is in the following terms:—(1.) "I have bequeathed Mauza Khudda, with all the property to Musammat Gombi, the daughter of my priest (purohit) whose marriage was celebrated by my father-in-law, and whom I have brought up as my own daughter. After my death, she shall be the owner in possession of the entire property in Mauza Khudda aforesaid."

Their Lordships hold that there can be but little doubt that

(1) (1907) L. R. 35 I. A. 17; 7 C. L. J. 131; I. L. R. 30 All. 84.

(2) (1884) I. L. R. 10 Calc. 342.

(3) (1914) 19 C. L. J. 563; I. L. R. 38 Bom. 399.

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under the first sentence of condition 4 there would have been a competent bequest of Khudda, the village, with the totality of rights falling under the designation "jumla-i-hakiat."

Under the second part of condition 4 which says that the village is to be owned in possession, their Lordships cannot hold that there has been any abatement of the force of the words employed. Those words are "malik-o-qabiz" Translated "owner in possession" they truly are "owner and possessor of." There can, according to their Lordships' view of this will, if condition 4 were alone under construction, be therefore no doubt, under either branch of it, that that village now belongs under this will to Musammat Gomi.

The argument presented to the Board, however, was that while that same form of expression was used in earlier portions of the will, there were appended to it certain conditions or elaborations of which a sample may be given from condition 1. "I shall continue" says that portion of the will "to be the owner in possession of the entire estate the subject of the will," and then there are added these words "and possess all the powers such as (those of) making sales, mortgages, gifts," &c.

In their Lordships' opinion these expressions do not abate from the completeness of the ownership and possession, nor do they fortify it in any way whatever. Accordingly condition 4, omitting the words which are thus surplusage, has to be given effect to, and it must be given effect to in the full sense recognised by law.

Their Lordships are of opinion that with regard to that sense there is now in the Indian law no doubt whatever. The judgment of Lord Collins in *Musammat Surajmani v. Rabi Nath Ojha* (1), attaches to the word "malik-o-qabiz" unquestionably a signification of a full ownership in property. Such an ownership in property in their Lordships' view was thus conveyed in this village to Musammat Gomi, and their Lordships will only conclude these observations by saying that in their view there is no repugnancy in such a construction. It is perfectly true that the entire estate was conveyed in the first place to Fateh Chand, but it was subject to conditions. On a perusal of those conditions, No. 4 occurs to the effect that as an exception from the conveyance of the entire estate this village is conveyed. This is not a repugnancy in the proper sense of the term, and taking the clauses of the will together it simply means that Fateh Chand takes the entire estate, with the exception of this village, while it, in proper conveyancing terms, is disposed of in favour of Musammat Gomi.

(1) (1907) L. R. 35 I. A. 17; 7 C. L. J. 131.

Their Lordships are accordingly of opinion that there is no ground for the argument which would upset the judgment of the learned Judges of the High Court. Their Lordships agree with that judgment, and they also agree with the observations made as to the judgment of the Subordinate Judge who, with much care had arrived at a different conclusion. The views of the High Court are shared by this Board, and accordingly they will humbly advise His Majesty that these appeals be dismissed with costs, including the costs of the petition for special leave to appeal.

*T. L. Wilson & Co.*:—Solicitors for the Appellants.

*Barrow, Rogers & Nevill*:—Solicitors for the Respondents.

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*Appeals dismissed.*

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## APPEAL FROM ORIGINAL CIVIL.

*Before Sir Lancelot Sanderson, Knight, Chief Justice and  
Sir Asutosh Mookerjee, Knight, Judge.*

NUNDO LAL MULLICK

v.

PUNCHANON MUKHERJEE.\*

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*Appeal—Order granting review—Civil Procedure Code (Act V of 1908), O. 47*

*R. 7—Appellate Court, if can entertain question as to sufficiency of evidence—  
Review on the ground of discovery of new evidence, when to be granted—  
Appeal on question of fact.*

Under rule 7 of order 47 of the Code of Civil Procedure, an order granting an application for review may be attacked by way of appeal, on the ground that the application has been granted on the ground of discovery of new evidence without strict proof of the allegation of the applicant that such new evidence was not within his knowledge or could not be adduced by him when the decree was passed.

Where the trial Judge in the exercise of his discretion, granted a review, it is not open to the Court of appeal to consider the question of the sufficiency of proof, at the instigation of the appellant. That Court is limited to the consideration of the question, whether there was strict proof, that is, proof according to the formalities of law, of the allegation.

A review may be granted, if new evidence, which could not have been obtained before, has been discovered which, if it had been adduced at the trial,

\* Appeal from Original Decree No. 79 of 1916, against the decision of Mr. Justice Greaves, sitting on the Original Side, dated the 19th April, 1916.

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would have been conclusive so that the verdict must have been found otherwise than it was.

It is not safe for the appellate Court to base its conclusion upon a mere comparison of handwriting without proper materials on the subject.

In an appeal upon a question of fact where the trial Judge has heard and seen the witnesses and has come to a conclusion upon the question of fact upon the evidence on the one side and on the other, there is a very great *onus* upon the shoulders of the appellant when he comes to the appellate Court and asks it to over-rule the decision of the learned Judge upon the question of fact.

*Per Sanderson, C. J.* : There should be some finality in the trial of cases, and the greatest care ought to be exercised in granting a review, when that review is asked for upon the allegation that fresh evidence has been discovered since the judgment was given.

*Per Mookerjee, J.* : Order 43 rule 1 cl. (w) should be read as controlled by rule 7, order 47 of the Code of Civil Procedure.

Appeal by the Plaintiff.

Suit for recovery of a sum of money.

The suit was first decreed but on review the decree was modified by the following judgment of

**Greaves J.**—This is an application by the defendant asking for a review of the decree passed by me in this case on the 7th March last on the ground of the discovery of new and important matter and evidence which was not within his knowledge and could not be produced by him at the trial.

The plaintiff claimed in the suit to recover sum of Rs. 2,282-14-3 from the defendant. This sum included a sum of Rs. 500 alleged to be due for the rent of 8 Mullick Street for the month of Pous 1321 and also a sum of Rs. 500 alleged to be due under a guarantee given by the defendant to the plaintiff in respect of the rent of certain premises payable to the plaintiff by one Singaram Poddar. Nothing now turns on the other sums which made up the plaintiff's claim of Rs. 2,282-14-3.

The defendant's defence to the claim for the two sums of Rs. 500 above referred to was that he had in fact paid these two sums to the plaintiff on the 13th March 1915 which corresponds with the Bengalee date the 29th Falgun 1321 and he produced what purported to be a receipt for the sum of Rs. 1,000 (Exhibit IV in the original case) written on ordinary paper and purporting to be written by Akhoy Kumar De the plaintiff's gomasta and signed by the plaintiff. I disbelieved the defendant's evidence at the trial with regard to this payment and I held that the receipt Exhibit IV was not signed by the plaintiff.

The new and important matter and evidence now brought forward is an entry in the plaintiff's *Roker* book for 1321 (Exhibit C

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in the original case) under date the 3rd Chaitra 1321 (17th March 1915) which is as follows "deposit credited Rs. 1,000 on account of Panchanon Mukhopadhyaya omission 29th Falgoun on account of Singaram's rent".

When the application was made to me for a Rule on the 13th March the roker book was still in Court and was on that day produced from the Record Room of the Court and contained the entry above referred to.

When the Rule came on for hearing the plaintiff denied that any such entry existed in the roker book when I heard the case alleged that the entry had been inserted by some one after I delivered my judgment on the 7th March. I accordingly directed an issue to be tried before me with witnesses as to whether this entry was in the roker book at the time of the hearing of the case or had been inserted since. This issue was tried before me on the 3rd and 4th April instant.

The existence of the entry was stated to have been discovered by the defendant in the following manner. He stated that he went every day to 8, Mullick Street and that on the 9th March at candle light he was going from the High Court (when he had another case on the peremptory board) to No. 8 and that when about to pass the plaintiff's house in Harrison Road he saw at a distance of 15 or 16 cubits Okhoy, a brother-in-law of the plaintiff, whose name he did not know but whom he subsequently identified in Court as Brindaban Chandra Sen coming out of the plaintiff's house that he quickened his pace to hear what they were saying and that when he had got within 4 or 5 cubits he heard his own name mentioned which roused his curiosity. He stated they were talking loudly and that there were not a large number of persons passing but only ordinary evening traffic and that he heard the brother-in-law say:—"you have done a feat—an extraordinary thing—you have done away with a receipt granted by one's own hand"; that Okhoy replied there is nothing extraordinary there is a credit of 1,000 Rs. in the books under 3rd Chaitra but in spite of their application they could not see it and that the brother-in-law said Charu Babu (the attorney) has cleverness.

The witness stated that he then turned into Mullick Street and went to No. 8, and subsequently on the 10th March at or about 1 o'clock went to see his attorney who lives some 10 or 15 minutes from his house.

The petition for review was settled on the 12th March and verified by the defendant on the 13th—he had not then inspected

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the entry nor had any one on his behalf but in page 8 of his petition he states that the entry shows that the payment was made on the 29th Falgoon—1321. It is certainly matter for comment that the defendant was able to make this statement with regard to the entry showing in express terms that payment was made on the 29th Falgoon having regard to his statement that his sole knowledge of the entry was derived from the conversation above mentioned which as detailed by him does not refer to the date of receipt.

I now come to deal with the custody of the exhibits in the case which included the Roker Book Exhibit C. Evidence on this point was given by the Court clerk Bonomali Chatterjee by Krishna Chunder Mukerjee who is in charge of the current original side Records and by Abdul Bari the Court farrash.

Before I deal with this evidence it is right to state that Counsel for the defendant applied after my judgment for return of the original books put in and a similar application was made by the plaintiff's counsel. This application was granted subject to copies being put in of the portions of the books tendered in evidence. I should state that the plaintiff did not take advantage of this permission to get possession of Exhibit C and it is suggested that he would certainly have done so had it contained the disputed entry. The evidence with regard to the exhibits is as follows. The Court clerk states that during the hearing of the case the exhibits are in his custody; that at the end of each day's hearing he puts them in order and then puts into an almirah in Court which he locks himself handing over the key to the record keeper and obtaining the key the next morning from the same source. He states that at the end of the case he checks the exhibits, puts them in order and puts them in the almirah and that if judgment is not reserved on that day or more usually the next day sends them down to the record room. He states that in this case he followed the usual practice and that when he checked the exhibits after I gave judgment on the 7th March he found one of the exhibits (Exhibit 6) missing and that he found on enquiry that it had got with some other papers at my house, that on the morning of the 10th Exhibit VI was returned and that in the evening of that day he put it in its place with the other exhibits, seeing Exhibit C there then, and that on the morning of the 11th March at about 12-30 he sent the exhibits in the case to the record room. He stated that from March 1st when the case commenced until the 11th the exhibits including Exhibit C were in his custody either in Court or locked in almirah and that Exhi-

bit C could not have been taken out without his or the record-keeper's help.

It appears that the key of the almirah when received by the record-keeper is put in a drawer which is locked up by the record-keeper on his departure and the key of the drawer is handed over together with his other keys to the Court-keeper.

After the rising of the Court it is the duty of a Jamadar to lock up the Court-room and to deposit the keys with the Court-keeper.

I am satisfied that if the entry in Exhibit C was not in existence at the time of the hearing of the case it must have been inserted between the 7th and 9th March and that Exhibit C could only have been obtained through the collusion of some one connected with the Court.

I now come to deal with the entry itself. The plaintiff denies all knowledge of it as also do his gomista Akhoy and his sirkar Fakir Chandra Dey, all these deny that it is in Okhoy's writing and Fakir Chandra Dey—who writes up the *khatian* from the *roker* and who also keeps the *Jabda*, which purports to be a copy of the *roker*, states that it does not appear in either the *khatian* or the *jabda* as it would have done if it had been made at the time it purports to have been. I cannot place any reliance on the *jabda* as it appears from the cross-examination of Fakir Chandra Dey to be full of omissions, errors and inaccuracies. Counsel for the defendant suggests that it has been prepared since the case started as it was not disclosed in the affidavit of documents and that it was prepared for use in the event of this entry being discovered. I express no opinion as regards this but I attach no value to the book for the reasons already stated. The witnesses for the plaintiff also seek to throw doubt on the genuineness of the entry from the fact that it bears no mark as do the other entries in the book, of ledgering but I attach no importance to this. The entry is admittedly not in the *khatian* and if the defendant's contention is correct it may have been entered in the *roker* and deliberately kept out of the ledger.

It is also urged by the plaintiff that there is no such account in his books as a deposit or suspense account and it is in evidence that for at least 20 years no account has even appeared in his books under any such heading. Moreover it is said that if such an account existed there would have been a similar account in the *khatian* which is not the case and the plaintiff's gomastha Okhoy further states with regard to the entry that he always writes the Bengali equivalent of the word translated rent with an 'rh' and not an

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't' as it appears in this entry and he states that nowhere else in the book is the word so spelt. It is difficult for me as I am ignorant of the language to gauge the value of this last bit of evidence, I mean as to the spelling of the Bengali equivalent of the word rent, and so far as the description of the account is concerned it appears to me that if the translation of the entry is correct that it does not refer to any particular account but only credits a sum of Rs. 1,000 as deposited on account of a particular indebtedness. And in this connection there is one peculiarity about the entry in that the whole sum of Rs. 1000 is stated to be on account of Singhi Ram's rent whilst it was the defendant's case when I heard the suit that the Rs. 1,000 was paid, as to Rs. 500 on account of the rent of 8, Mullick Street, and as to Rs. 500 only in respect of the Singhi Ram guarantee. But I think that this does not throw doubt on the authenticity of the entry but rather supports it. If it were fabricated one would have expected to have found it accord with the defendant's story as to the accounts in respect of which the two sums of Rs. 500 were paid.

Some discussion took place before me as to what happened with regard to the discovery of the *roker* and *khatian* prior to the hearing of the case. The plaintiff stated that full discovery had been given but the defendant states that discovery was only given of those entries disclosed in the affidavit of documents. Having regard to what happened before Mr. Justice Chaudhuri I have no doubt that the defendant's statement is correct and that discovery was limited to the actual entries disclosed in the affidavit of documents. But when the case was before me in Court I am satisfied that both the defendant's counsel and attorney had an opportunity of inspecting any entry in these books. Mr. H. D. Bose cross-examined as to entries being made some days after moneys were received and actually put to the plaintiff and his gomastha Okhoy entries where this had been done. The very next page to that upon which the entry in dispute occurs is marked as an exhibit in the case 12 in C and it is I think somewhat surprising that if the entry was in the *roker* when I heard the case that it was not noticed in the course of the trial. Of course counsel when cross-examining may well not have noticed it but I should certainly have expected the defendant's attorney when he had an opportunity of examining the *roker* especially having regard to what happened with regard to discovery to have taken the opportunity of looking at the entries for the few days following the 29th Falgoon. And I have a clear recollection that at the trial no attempt was made to prevent the

defendant's advisers from inspecting any part of the *roket* he chose or to confine the inspection to particular entries.

As to the writing of the entry I am not in a position to judge as to whether it resembles the writing in the rest of the book but it certainly appears to be written in different ink and I should say with a different pen to the other writing on the page.

It was suggested by the defendant that unless this entry had been there originally, this would be the only page in the *roket* with no credit entry, but I am not sure that this is so and that there are not, looking back through the book, other pages with no credit entries.

As to the absence of the usual credit of 4 rupees this is curious but I do not think it helps the defendant's contention.

With regard to the manner in which the discovery was made the story appears to me curious and suspicious not to say improbable. Okhoy denies having left the plaintiff's house until much later than 7 o'clock on the 9th March and denies the story of the conversation and Brindaban Chandra Sen the brother-in-law gives a similar denial and states he did not leave 30 Strand Road where he is employed until 7-15 that evening and produces an attendance book in support of his story. I do not think that much reliance can be placed on this book as it seems to me carelessly kept.

It is I think abundantly clear that if the entry was made after I heard the case it could only have been made with the connivance and assistance of some person connected with this Court.

Moreover it appears that unless that person had been the Court clerk the task of obtaining the book and keeping it for sufficient time to make the entry would have been not only extremely difficult (meaning as it did obtaining the book, keeping it sufficient time to make the entry and returning it) but very likely to lead to discovery.

I am satisfied that the Court clerk whom I have always found a capable and trustworthy officer did not give access to or part with the book except in the course of his duties in Court whilst it was in his custody from March 1st when it was made an exhibit until it was sent to the record room on the 11th March.

Am I then entitled to enter into the realms of speculation as to whether any one could have obtained the book without the Court clerk's knowledge either during or after Court hours, I think not unless I am abundantly satisfied without any vestige of doubt that the entry was not in the *roket* when I tried the case and that the entry bears on its face clear and undoubted evidence of subsequent insertion. I cannot say that the entry bears on its face clear and

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undoubted evidence of subsequent insertion. The result is that I am unable to hold upon the evidence (as I should otherwise have done but for the seeming impossibility of any subsequent insertion of the entry) that the entry was not in existence when I tried the case. I accordingly decide the issue by declaring that the entry was in the *Foker* book when I tried the case and has not been inserted subsequently.

I grant the review asked for and there will be judgment for the defendant in the case with costs which will include the costs of the review and of the hearing of the issue.

I direct that in future the Court clerk shall always himself fetch the key of the almirah from the Record Room and I direct the Record-keeper to hand the key of the almirah to no one but to him personally.

The plaintiff then preferred an appeal.

*Messrs. S. R. Das and C. C. Ghose* :—for the Appellant.

*Messrs. H. D. Bose, A. N. Choudhury and N. N. Bose* :—for the Respondent.

The following judgments were delivered :—

February, 9.

**Sanderson, C. J.**—This is an appeal from a judgment of Mr. Justice Greaves, and it is a case, in my opinion, of considerable importance, having regard to one of the issues which has been raised.

The suit was for a sum of Rs. 2,282-14-3 pies. But in fact the only dispute was as to whether the defendant had paid the sum of Rs. 1,000 which was a part of the sum for which the suit was brought.

The learned Judge when he tried the case gave his decision on the 7th of March, 1916, and he came to the conclusion that an alleged receipt in respect of the Rs. 1,000 in question which was put forward by the defendant was a forgery and had not been signed by the plaintiff. He also expressed a strong opinion with regard to the way in which the witnesses gave their evidence.—He said, "If I have to choose between the evidence of the plaintiff and the defendant, I would unhesitatingly prefer the evidence of the plaintiff. So far as I could see, he seemed to me a truthful witness" and later on he said "Having regard to this fact," (referring to the signatures which were put before him), "and also the demeanour of the witnesses in the witness-box, I think my judgment in this case ought to be in favour of the plaintiff."

Then an application for a review of that judgment was made by the defendant on the 13th of March, 1916, and it was based upon the allegation that fresh evidence had been discovered, and

the fresh evidence which was alleged to have been discovered was an entry in one of the plaintiff's books, which was under date the 17th of March, 1915, purporting to state that this Rs. 1,000 had been paid on the 13th of March, 1915. The actual entry translated by my learned brother Mr. Justice Mookerjee—a translation which was adopted by both the learned counsel in the case—was to this effect : The account was called “a deposit or suspense account”—there was a word which might be translated as deposit or suspense and we might read it as a deposit account or a suspense account as you prefer to translate it—“Received Rs. 1,000 from Panchanon Mukerjee, dated the 29th Falgun, on account of Singhuram Poddar on account of rent Rs. 1,000.”

I ought to have mentioned that this Rs. 1,000 which, it was alleged, had been paid was supposed to be in respect of one month's rent which was due from the defendant himself in respect of the premises in question and also in respect of Rs. 500 part of a sum which the defendant was bound to pay under a guarantee which he had given for one, Singheeram Poddar, one of the sub-lessees of the said premises.

Then the learned Judge upon this application for review directed an issue to be tried ; and, the issue was whether this entry was in the *roket* book at the time of the hearing of the case or had been inserted since. Upon that issue the learned Judge came to the conclusion that the entry was in the *roket* book when he tried the case, and had not been inserted subsequently. He, therefore, granted the review ; but he did not follow the procedure which is directed by order 47 rule 8 of the rules under the Civil Procedure Code, which provides that “when an application for review is granted, a note thereof shall be made in the register and the Court may at once re-hear the case or make such order in regard to the re-hearing as it thinks fit :” He proceeded to give judgment for the defendant, on all the facts of the case which had been proved before him both in the first trial and also at the hearing of the issue. It was, however, agreed by the learned counsel in this Court that no objection should be taken upon the ground that the learned Judge had not strictly followed the procedure which is laid down by order 47 rule 8, but that it should be taken that he had re-tried the case and had given judgment for the defendant on all the facts of the case.

When the case comes to this Court, first of all there is an appeal from the learned Judge's decision that there ought to be a review ;

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and, *secondly* there is one appeal from his decision in favour of the defendant upon all the facts of the case.

Now, in respect of the first matter I think that this case is of general importance, namely the question whether there ought to have been a review.

The other point is undoubtedly of importance to the parties themselves, because there is a sum of Rs. 1,000 involved and considerable costs which have been incurred, but that point is not of general importance.

Now, with regard to the question whether there ought to have been a review, the learned Judge has exercised his discretion and has granted it, and, in my judgment, it is not possible for us on this appeal to say that he ought not to have made an order for a review, for this reason: It is admitted by the learned counsel for the appellant that order 47, rule 1, (1) of the rules under the Civil Procedure Code is applicable to this case, and that rule provides as follows: "Any person considering himself aggrieved by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,...and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge, or could not be produced by him at the time when the decree was passed, or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order." Then there is rule 4 of that order which provides, (1) "Where it appears to the Court that there is not sufficient ground for a review, it shall reject the application." (2) "Where the Court is of opinion that the application for review should be granted, it shall grant the same." "Provided that.....no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made, *without strict proof* of such allegation." The matter does not rest there, because rule 7 provides "An order of the Court rejecting the application shall not be appealable"; "but an order granting an application" (which was the case here) "may be objected to on the ground that the application was (a) in contravention of the provisions of rule 2"—(it does not apply to this case)—"(b) in contravention of the provisions of rule 4....." "Such objection may



be taken at once by an appeal from the order granting the application or in any appeal from the final decree or order passed or made in the suit." Therefore, in my judgment, we are limited to seeing whether the application was granted by the learned Judge in contravention of the provisions of rule 4. To go back to the provisions of rule 4 (b), it says "There must be strict proof of such allegation." What is the allegation? The allegation is that "the matter or evidence was not within the applicant's knowledge or could not be adduced by him when the decree or order was passed or made." Now, having regard to the evidence which has been referred to by the learned Judge, I cannot say that there was *not strict proof* of those facts, namely, that the applicant had not knowledge of the new evidence or that he could not have adduced it at the time of the trial. I think it is only necessary to mention the fact that the book in which the entry was made had not been produced until the trial of the action: In fact the plaintiff had claimed his right to limit the inspection to the entries which he swore were relevant to the matter in issue, and it was not until the case was being heard before the learned Judge that the defendant's attorney had the first opportunity of looking at the book generally: and, I think it was quite possible, as was pointed out by the learned Judge, that the learned counsel for the defendant when he was in the act of cross-examining, although he looked through the book, might have missed this entry, especially as he was not looking for this particular entry, but he was looking for other entries to prove that the receipts of money were not always entered on the particular dates on which the money was received. Further, the evidence is not such that it is possible to say that during the course of the cross-examination the defendant's attorney ought to have seen or must have seen the entry in question, if it was there, consequently, I do not think that this application for a review was granted in contravention of rule 4 of order 47.

But having regard to the argument which has been addressed to us on the one side as well as on the other, during the course of the appeal, as to the principle on which a review ought to be granted, when it is asked for upon the allegation that fresh evidence has been discovered, I think it is right to express my judgment with regard to the principle which ought to be acted upon in future with regard to such cases.

In my judgment it is most important that there should be some finality in the trial of cases, and the greatest care ought to be exercised in granting a review, when that review is asked for upon the

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allegation that fresh evidence has been discovered since the judgment was given. It must be obvious to every one that unless great care is exercised when such an application is made, the door may be thrown open to all kinds of abuses ; it is so easy to the party who has lost his case, to see what the weak part of his case was, and the temptation to try and procure evidence which will strengthen that weak part and put a different complexion upon that part of the case must be very strong.

I do not think that I can do better than refer to two authorities upon that point which were referred to in the course of the argument. The cases to which I desire to refer are first, *Young v. Kershaw* (1) in which the judgments were delivered by Lord Justices A. L. Smith, Collins and Williams. Lord Justice A. L. Smith said this, "It seems to me that the cases which have been referred to show that a new trial may be granted"—I may say in passing that in this respect the question whether a review may be granted is the same as whether a 'new trial may be granted'—"if new evidence, which could not have been obtained before, has been discovered which, if it had been adduced at the trial, would have been conclusive so that the verdict must have been found otherwise than it was. I think that is the rule, apart from all the authorities, which I will not discuss. That being so, what is the new evidence in this case which the defendant has discovered ? Would that evidence have been conclusive of this case if it had been adduced at the trial ? In my opinion it is evidence obtained under suspicious circumstances, and for that reason alone I think that it cannot be considered as conclusive."—I draw attention to that, because the learned Judge in his judgment has said that the circumstances under which this evidence came to light were "curious and suspicious not to say improbable."—As I have said, I think having regard to the provisions of order 47 rule 7, this Court is debarred from going into this matter, and I am only dealing with it for the purpose of expressing the principle upon which the question now under discussion ought to be dealt with.—Lord Justice Collins said, "It is obviously in the public interests that parties, who have gone through the ordeal of litigation and have had their rights settled at the trial, should not afterwards be allowed to patch up the weak parts and fill up the omissions in their case by means of fresh evidence. That is a rule of great importance. It is true that in special and exceptional circumstances a new trial has been granted because new evidence has been discovered. But the rule which

(1) (1899) 81 L. T. 531.

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from the judgment of a learned Judge upon a pure question of fact at a trial in the ordinary course of events. I have said so many times that I hardly need repeat it now, that in an ordinary case, where the appeal is upon a question of fact where the learned Judge of the Court of first instance has heard and seen the witnesses and has come to a conclusion upon the question of fact upon the evidence on the one side and on the other, there is a very great *onus* upon the shoulders of the appellant when he comes to this Court and asks it to overrule the decision of the learned Judge upon the question of fact. But this is not a case such as I have described. The circumstances of this case are peculiar, and I should think, probably they may never be repeated. In my experience I have never come across a case at all like it, because the position is this: The plaintiff brought his action for the recovery of Rs. 2,282 and it is alleged that he did so knowing that he had given a receipt for Rs. 1,000 a part of that sum, knowing that he had in his *ruker* book an entry which would show that the money was paid—in accordance with the defence that was set up by the defendant, knowing that though perhaps for a time he might by swearing falsely conceal that entry, knowing at all events his advisers must have known that sooner or later that book would probably be inspected, and the entry would come to light, and knowing all that, he brought his action for the sum. The learned Judge having heard the case, and having considered it, and having dealt with the evidence on the one side as well as on the other came to the distinct conclusion that the truth lay upon the side of the plaintiff, that the receipt in question, in respect of the Rs. 1,000, was a forgery and that the money had not been paid and that the plaintiff was a witness of truth and the defendant was not a witness of truth. Then comes the other evidence and the learned Judge had to approach this further evidence, namely the production of the entry from this point of view, that the circumstances under which the evidence came to light were "curious and suspicious not to say improbable:" and, I am not surprised that the learned Judge came to that conclusion having regard to the story told by the defendant as to how he came to know that there was this entry in existence, I need not repeat the story in detail: But the suggestion is that a few days after the trial, as the defendant was going home from the High Court,—he had to pass the plaintiff's house or the way to his own house, just when he was approaching the plaintiff's house he saw the plaintiff's brother-in-law and the servant Aukhoy coming out of the house, and he heard them talking about the case which had just been decided, the plaintiff's brother-in-law expressing

admiration to Aukhoy as to how the difficulty of the receipt had been got over. I had better quote the defendant's own evidence as to this. He says, "the brother-in-law said, you have performed a feat—you have done an extraordinary thing. You have done away with the receipt granted with Nando's own hand." Aukhoy then said, "there is nothing extraordinary in this. There is a credit of Rs. 1,000 on the 3rd Chaitra, but inspite of this application they could not see it". He mentioned the date of 3rd Chaitra. He did not mention the date of payment. Then the brother-in-law said, 'Charu Babu has cleverness.' It should have thought that that story in itself was highly improbable, but then there were other circumstances which lead me to believe that that story may be described not only as "curious and suspicious not to say improbable, but one which could not be accepted." I need not go further than to say that I agree with the description which the learned Judge gave to it.

Now, there are several other matters which are relevant to the consideration of the point at issue.

Looking at the entry itself—and here I speak, like the learned Judge in the Court below, with some hesitation, because I have not the advantage, which the learned counsel on both sides and my learned brother have, of knowing the language in which the entry was made,—and, therefore I confine myself to saying this, it is obvious it is written in a different ink to the other entries which are on the same page. It is also obvious that it is the only credit entry on that page, and therefore it is difficult to understand why this came to be written in a different ink and with a different pen. And, if that was made in the ordinary course of business one would have expected it to have been made by the same person who made the entries on the debit side with the same ink and same pen. There is something more important than this: It is not, I understand, disputed that everyone of the entries upon that page on the debit side have been carried forward to the ledger by the person who was employed to do that—the entries are ticked and they are carried forward to the ledger. If this entry was made in the ordinary course of business it must have been made, as the defendant's case is, on the 17th March. But I do not see why this entry was not ticked and carried forward in the ledger. This point, however, is not confined to that page. The defendant is not able to put before the Court a single other entry in that cash book, which was not carried forward in the ledger except the one which is in dispute. This, to my mind, is evidence which points strongly to the fact that the entry did not come into existence in the ordinary course of

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business. But it is urged by the defendant that the receipt was obviously written, first of all, as regards the body of it, by Aukhoy, and *secondly* as regards the signature by the plaintiff. I do not intend to express any opinion upon that, because I do not like to base my judgment upon the observations which I made during the course of the case as regards the handwriting, although I have with the assistance of my learned brother observed some things. I am content to say that the learned Judge who saw the witnesses, and heard them give their evidence and who himself compared the signature in question with other admitted signatures of the plaintiff, and who was in a far better position to judge of it than I am, has come to the conclusion that that was not the plaintiff's signature, and I am content to adopt his conclusion.

There is another matter which weighs with me, and that is this: If it be right to regard, as I think it is right, the circumstances under which this evidence came into existence as not only curious and suspicious but also improbable, so that the story is one which cannot be accepted, one has to ask oneself why such a story, was brought forward. With what object was it brought forward? If that story is incredible why was it told? It could be told only for the purpose of explaining that which otherwise was inexplicable, viz. how it was that the defendant came to know of this entry.

These are some of the reasons which make me think that the evidence with regard to the entry in the *rokar* book is unsatisfactory, and if I had been the learned Judge who had to exercise his discretion as to whether he would grant a review or not, I would have refused, because the evidence came into existence under suspicious circumstances and was not in itself conclusive, inasmuch as there was a conflict of evidence as to whether it existed at the time of the trial or not.—There is evidence on the one side as well as on the other side, and if there be a doubt as to whether the evidence as to the existence of the entry at the date of the trial ought to be accepted or not, it is difficult to see how it can be said to be conclusive. I have, however, already said that we are bound by the rule to which I have referred, and we cannot go into the matter of the review. But the nature of the evidence and the circumstances under which it came into existence are material when I am considering the question whether the learned Judge upon all the facts of the case ought to have, in effect, over-ruled his previous decision. In my judgment, the evidence with regard to this entry is of such an unsatisfactory nature and it came into existence in such an unsatisfactory way and the learned Judge was apparently

in such doubt as to whether it should be accepted, that it ought not to be taken as sufficient to overrule the distinct and clear opinion which he had formed, namely that the money had not been paid, that the receipt had been a forgery, and that the plaintiff ought to be believed.

For these reasons, emphasizing again as I do, that this is not an ordinary case of an appeal from a judgment upon a question of fact but that it is a case out of the ordinary, and with peculiar circumstances, in my opinion, the learned Judge's judgment on the previous occasion when he came to the conclusion that the money had not been paid, ought to be upheld, and judgment ought to be given in favour of the plaintiff.

The result is that the appeal against the review is dismissed. The appeal against the final decree of the Court of first instance is allowed and judgment for the plaintiff is to be entered, with costs of both hearings in the Court of first instance. The plaintiff will have the costs of the appeal except one day's costs which are to be defendant's and set off against the plaintiff's costs.

**Mookerjee, J.**—This appeal raises two distinct questions: The first relates to the propriety of the order made by Mr. Justice Greaves on an application for review of judgment presented to him on the 13th March, 1916; the second relates to the correctness of the final decree made by him on review, in modification of the decree made at the original trial.

The plaintiff instituted this suit for recovery of a sum of money from the defendant. The defendant pleaded that the plaintiff had not allowed him credit for Rs. 1,000 which he had paid on the 13th March, 1915, and for which he held a receipt. Mr. Justice Greaves, who tried the suit, came to the conclusion that the receipt was not genuine and that on the oral evidence the defendant had failed to prove the plea of payment. The result was that the claim was decreed in full on the 7th March, 1916. Six days later, the defendant made an application for review of judgment under order XLVII, rule 1, sub-rule (1) of the Civil Procedure Code, 1908, on the ground that he had discovered new and important evidence which was not within his knowledge and could not have been, by the exercise of due diligence, produced by him at the time when the decree was passed. The new evidence consisted of an entry in an account book filed by the plaintiff at the trial, which recited the alleged payment of Rs. 1000 by the defendant. The application for review was heard in due course and was granted, notwithstanding the assertion of the plaintiff that the entry was not in the

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account book when it was filed in Court on his behalf and must have been interpolated therein, after the close of the trial, at the instance and for the benefit of the defendant. Upon this disputed question of fact, Mr. Justice Greaves came to the conclusion that he could not hold, upon the evidence, as he would otherwise have done but for the seeming impossibility of any subsequent insertion of the entry, that the entry was not in existence when he tried the case. The procedure prescribed by rule 8 of order XLVII was, however, not strictly followed, and the case was not reheard, but a decree was forthwith made in modification of the decree made at the original trial and credit was allowed to the defendant to the extent of Rs. 1,000.

The present appeal by the plaintiff was at first argued as an appeal directed against the order granting the review, but it was subsequently agreed between the parties that the appeal should be deemed as directed not merely against the order granting the review but also as against the final decree made in the suit. We have now to consider the questions raised in the appeal thus widened in scope by consent of parties.

Now, in so far as the appeal is directed against the order granting the review, it is clear that the scope of the appeal is restricted by rule 7 sub-rule (1) clause (b) of order XLVII of the Code, the provisions of which are to this effect: "An order granting an application may be objected to on the ground that the application was in contravention of the provisions of rule 4": and, rule 4 prescribes in clause (b) of the proviso that "No application for review shall be granted on the ground of discovery of new matter as evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made, *without strict proof of such allegation*". Consequently, under rule 7, an order granting an application for review may be attacked by way of appeal on the ground that the application has been granted on the ground of discovery of new evidence without strict proof of the allegation of the applicant that such new evidence was not within his knowledge or could not be adduced by him when the decree was passed. In the case before us, Mr. Justice Greaves has held and, as the materials on the record show, correctly held that there was such *strict proof*. In these circumstances, it is not open to this Court as the Court of appeal to consider the question of the sufficiency of proof, at the invitation of the appellant. This view is supported by a long series of decisions in this Court, to which reference will presently be made. But

the appellant has invited our attention to order XLIII, rule 1, clause (w) of the Code, which allows an appeal against an order granting a review; and, has contended that the appeal thereby given is not restricted in its scope. In my opinion this contention is not well founded and is opposed to the decisions in *Jagarnath Prosad Singh v. Ramavatar Singh* (1) and *Hari Charan Saha v. Baran Khan* (2). These cases recognize the principle that order XLIII, rule 1, clause (w) must be read as controlled by rule 7, order XLVII of the Code. This is emphasized by the decision in *Ahed Khondkar Mohendra Lal De* (3). In that case, an application for review had been granted by the Court of first instance on the ground of discovery of new evidence after the trial. An appeal was preferred against that decision, and the Court of appeal came to the conclusion that there had not been sufficient proof of the allegation that the new evidence was not within the knowledge of the applicant and could not have been adduced by him when the decree was passed. A second appeal was preferred to this Court and was heard by Mr. Justice N. R. Chatterjea, who held that the Court of appeal below was competent to determine the question of the sufficiency of the evidence adduced in support of the allegation made by the applicant, as otherwise the provision for appeal would be meaningless. An appeal was then preferred under clause 15 of the Letters Patent and was heard by Sir Lawrence Jenkins C. J. and Mr. Justice Woodroffe, who held that the expression "strict proof" means proof according to the formalities of the law and has no reference to the sufficiency of the quantum of evidence adduced. The result was that the judgment of Mr. Justice N. R. Chatterjea was reversed and the case was remanded for consideration of other points which arose in the appeal. [See also *Indar Koer v. Baldeo Baksh* (4)] We are thus limited to the consideration of the question, whether there was strict proof, that is, proof according to the formalities of law, of the allegation that the new evidence was not within the knowledge of the applicant and could not have been adduced by him at the original trial. That there was strict proof in this sense cannot be disputed. It is consequently not open to us to reverse the order whereby review was granted by Mr. Justice Greaves on the ground that the evidence was not sufficient to support his conclusion. But as the case is of considerable importance, I feel bound to record my concurrence in the opinion

(1) (1911) 14 I. C. 39.

(2) (1914) I. L. R. 41 Calc. 746.

(3) (1915) 19 C. W. N. 804; I. L. R. 42 Calc. 830.

(4) (1910) 13 Oudh cases 248.

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expressed by the learned Chief Justice that the procedure followed was contrary to well-established principles. The decisions in *Young v. Kershaw* (1), and *Brown v. Dean* (2), emphasize the care to be exercised in granting an application for review of judgment on an allegation of discovery of new matter or evidence; the new evidence must at least be such as is presumably to be believed and if believed would be conclusive [see also *Warham v. Selfridge* (3)]. I may add that the same view has been taken by the Judicial Committee in two recent cases, namely, *Turnbull & Co. v. Duval* (4) and *Kessowji Issur v. Great Indian Peninsula Railway Company* (5). In the first of these cases, Lord Lindley observed that a new trial ought never to be lightly granted: and, he held with reference to the circumstances of that case, that no case of fraud or surprise had been made out. In the second case, Lord Robertson pointed out the dangers inseparable from the grant of an application for review of judgment on an allegation of discovery of new matter or evidence. In that case, an application was made to the trial Court for review of judgment on the ground of discovery of new matter or evidence. That application was refused. On an appeal preferred against the decision of the trial Court, an application was made to the Court of appeal to receive such additional evidence. The appeal Court acceded to this prayer, and on the evidence so admitted, taken with the evidence previously on the record, reversed the decision of the trial Court. The Judicial Committee condemned this procedure and held that the additional evidence which it was alleged had been discovered after the decision of the trial Court should never have been received. I cannot consequently see any escape from the conclusion that, in the case before us, the additional evidence should not have been received and should not have been accepted as a ground for granting the application for review. But, as I have already said, it is not open to this Court, under rule 7 of order XLVII, to reverse the order of Mr. Justice Greaves on this ground.

We have next to consider the appeal in so far as it assails the correctness of the decree ultimately made by Mr. Justice Greaves in modification of the decree made by him at the first trial. The question in controversy relates to the alleged payment of Rs. 1,000 by the defendant to the plaintiff on the 13th March 1915. The evidence may be divided into oral testimony and documentary

(1) (1899) 81 L. T. 531; 16 T. L. R. 52.

(2) (1910) App. Cas. 373.

(3) (1914) 30 T. L. R. 344.

(4) (1902) App. Cas. 429.

(5) (1907) L. R. 34 I. A. 115; 6 C. L. J. 5; I. L. R. 31 Bom. 381.

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proof. In so far as the oral testimony is concerned, we have oath against oath. Mr. Justice Greaves who had the opportunity of seeing the witnesses expressly stated in his first judgment that the evidence on the side of the defendant was untrustworthy and that if he had to choose between the plaintiff and the defendant, he would without hesitation accept the testimony of the plaintiff; he further described the demeanour of the witnesses on behalf of the defendant as unsatisfactory. Under such circumstances, I am not prepared to take a different view of the value of the oral testimony from what has been adjudged by the trial Judge. As regards the documentary evidence, we have two important items, namely, first, a receipt alleged to have been given by the plaintiff to the defendant, and, secondly, an entry alleged to have been made in the account book produced at the trial by the plaintiff. As regards the receipt, Mr. Justice Greaves pronounced against its genuineness. We have been invited in this Court to compare the signature on the receipt with the various admitted signatures of the plaintiff on the record; but, as pointed out by the Judicial Committee in *Kurali v. Anantaram* (1), it is by no means safe to base our conclusion upon a mere comparison of handwriting without proper materials on the subject: [*Shankar Rao v. Ramji* (2)]. Consequently, I must hold that the view taken by Mr. Justice Greaves that the receipt was not genuine has not been successfully attacked in this Court. There remains finally the entry in the account book. That entry, is of the most suspicious character, and I am by no means convinced that it was in fact in existence at the date of the first trial. On the strength of evidence of such doubtful value, I cannot hold that the defendant has discharged the burden which lay upon him to establish his plea of payment.

On these grounds, I agree that this appeal must be allowed and the first decree of Mr. Justice Greaves restored.

*Mr. C. C. Bose*—Attorney for the Appellant.

*Babu Abinash Chandra Ghose*—Attorney for the Respondent.

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*Appeal allowed.*

(1) (1871) 8 B. L. R. 490.

(2) (1903) I. L. R. 28 Bom. 58.

## CRIMINAL REVISION.

*Before Mr. Justice Teunon and Sir Syed Shamsul Huda,  
Knight, Judge.*

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UMESH CHANDRA ROY

v.

SATIS CHANDRA ROY AND OTHERS.\*

*Prosecution, withdrawal of—Court to record reason—Criminal Procedure Code  
(Act V of 1898), Sec. 494.*

When a Court acting under section 494 of the Code of Criminal Procedure, gives its consent to a withdrawal from a prosecution, it should record its reasons in order that High Court may be in a position to say whether the discretion vested in the Court has been properly exercised.

Application for revision by the Complainant.

The accused were charged under section 302 of the Indian Penal Code.

The material facts appear from the judgment.

*Mr. B. N. Sasmal and Babu Sisir Kumar Ghosal* for the Petitioner.

*Mr. P. N. Dutt and Babu Hit Lal Guha* for the Opposite Party.

The judgment of the Court was delivered by

Teunon, J.—This Rule is directed against an order made by the Sub-Divisional officer of Uluberia under the provisions of section 494 (a) of the Code of Criminal Procedure.

It appears that on the application of the Court Sub-Inspector acting as Public Prosecutor the Magistrate accorded his consent to the withdrawal by the Public Prosecutor from the prosecution of three persons who under the provisions of section 170 of the Code had been sent up for trial on charges of rape and murder. For this order according his sanction to the withdrawal from the prosecution and to the subsequent or consequential order discharging the accused the Magistrate gave no reasons. As from the petition presented by the complainant it appeared that one of the persons put on their trial had made a confession implicating himself and the others. We were of opinion that these orders should be examined by this Court.

The learned Counsel who has appeared to oppose this Rule on behalf of the accused persons has contended that the consent given

\* Criminal Revision No. 662 of 1917, against an order of A. B. De, Esq. Sub-Divisional Magistrate of Uluberia, dated the 16th May, 1917.

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by the Court under the provisions of section 494, Criminal Procedure Code, is to be regarded as a mere ministerial or executive act for which it is not necessary that the Magistrate should set out any reason ; and in support of this view he refers us to a case decided by two learned Judges of the Madras High Court and reported in 4. Indian Cases, 1126. With all deference to the opinion there expressed by these learned Judges we are unable to assent to the view there taken, or to the view now urged upon us by the learned counsel appearing in the present case. The only prosecutor who may under the provisions of the Code of Criminal Procedure withdraw from a prosecution without obtaining the consent of the Court and without giving reasons is the Advocate-General. No other Public Prosecutor is placed in that privileged position ; and if the consent of the Court is to be regarded as a ministerial act or merely an executive act we do not understand why it should have been necessary for the Legislature to insert such a provision in the section of the Code with which we are now dealing. It is clear to our minds that in either withholding consent or in according consent the Court is acting in a judicial capacity, and for its order as for every orders judicially made it ought to give and record its reasons. We are fortified in this view by a consideration of the provisions of sections 435 and 437 of the Code of Criminal Procedure. If the consent has been improperly accorded it is clear that the consequential discharge must also be looked upon as improper. For these reasons we are of opinion that when a Court acting under section 494 of the Code gives its consent to a withdrawal from a prosecution it should record its reasons in order that this Court may be in a position to say whether the discretion vested in the Court has been properly exercised.

In the present case the Magistrate has now submitted to this Court in his explanation the reasons which led him to make the order under consideration. We are not satisfied that the first reason in which he refers to the action of the Superintendent of Police is a good or sufficient reason. We are not certain that the discretion vested in the investigating officer by the provisions of section 170, Criminal Procedure Code, can be controlled in the way suggested, by the Superintendent of Police ; or so controlled after the discretion has been exercised. But the other reasons that have been given by the Magistrate appear to us to be of a more substantial character. We have examined for ourselves what was put forward to us as a confession implicating the confessing accused and his co-accused ; and when we read it we find that he, the confessing accused does not in fact implicate himself. In the course of the

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argument before us, reference has been made to a confession said to have been made by the same accused in his village in the presence of a number of villagers. But it would appear that that confession was made while the accused was in the presence and practically in the custody of police officers, so that also becomes inadmissible.

Having now considered the reasons which led the Magistrate to consent to the withdrawal from the present prosecution we are of opinion that in the present case we ought not to interfere. But we desire to point out that after all the ultimate order is one only of discharge, and that if and when evidence becomes available it will still be open to the Crown or to the Court to re-open this prosecution.

A. T. M.

*Rule discharged.*

*Before Mr. Justice Tennon and Mr. Justice Richardson.*

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*Criminal Procedure Code (Act V of 1898), Sec. 435—'Discharge'—Acquittal on a charge actually framed, if a discharge in respect of any other charge which might have been framed.*

A was tried by a Magistrate exercising first class powers, upon a charge of forgery framed under section 465 of the Indian Penal Code. The Magistrate found him not guilty and acquitted him under section 258 of the Code of Criminal Procedure. The complainant then moved the Sessions Judge. He held that the offence alleged, fell under section 467 of the Indian Penal Code and made an order directing that A be committed to the Court of Sessions for trial upon a charge framed under that section :

*Held, Per Tennon, J. :* The Magistrate's order acquitting A of an offence under section 465 of the Indian Penal Code, was an order discharging A of the graver offence in respect of the same document punishable under section 467.

*Baijannaik v. Gauri Kanta* (1) doubted.

*Per Richardson, J. :* The Sessions Judge had no power to direct A's commitment to the Sessions Court for trial, as the Magistrate made no order which was either in terms or in substance an order of discharge.

\* Criminal Revision No. 538 of 1917, against an order of the Sessions Judge of Backergunge, dated the 16th April, 1917.

(1) (1893) I. L. R. 20.Calc. 633.

Application for revision by the Accused.

The material facts appear from the judgment of Richardson, J.

*Mr. A. K. Fazlul Huq, Babus Atindra Nath Mukerjee and Gagan Chand Bural* for the Petitioner.

*Mr. P. N. Dutt, Babus Ganesh Chandra Das Gupta and Sarat Chandra Mukerjee* for the Opposite Party.

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The judgments of the Court were as follows :

**Richardson, J.**—This Rule was issued at the instance of the petitioner, Abdul Hakim Khan.

June, 18.

The petitioner was tried by a Magistrate exercising first class powers upon a charge of forgery framed under section 465 of the Penal Code. The learned Magistrate found him not guilty and acquitted him under section 258 of the Criminal Procedure Code.

The complainant in the case then moved the Sessions Judge of Backergunge upon the grounds that the document to which the charge related was a valuable security and that the petitioner should properly have been charged under section 467 of the Penal Code and committed for trial upon that charge to the Court of Sessions.

It may be mentioned that an offence punishable under section 465 is triable by a Magistrate of the first class while the Court of Sessions alone is empowered to try the aggravated offence of forging a valuable security, punishable under section 467.

The Sessions Judge, having heard the matter, held that the offence alleged fell under section 467 and he made an order directing that the petitioner be committed to the Court of Session for trial upon a charge framed under that section.

The question which arises is whether the learned Sessions Judge had jurisdiction to make that order and for the present purpose it may be assumed without deciding the point that the document which the petitioner is said to have forged is a valuable security.

The order purports to be made under section 436 of the Criminal Procedure Code which runs as follows :—

“When, on examining the record of any case under section 435 or otherwise, the Sessions Judge or District Magistrate considers that such case is triable exclusively by the Court of Sessions and that an accused person has been improperly discharged by the inferior Court, the Sessions Judge or District Magistrate may cause him to be arrested, and may thereupon, instead of directing a fresh inquiry, order him to be committed for trial upon the matter of

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which he has been, in the opinion of the Sessions Judge or District Magistrate, improperly discharged."

Then come two provisos :—

"Provided, as follows, (a) that the accused has had an opportunity of showing cause to such Judge or Magistrate why the commitment should not be made.

(b) That if such Judge or Magistrate thinks that the evidence shows that some other offence has been committed by the accused, such Judge or Magistrate may direct the inferior Court to inquire into such offence."

The question before us turns on the meaning of the word "discharged" as used in the section. The same word is used in the following section, section 437. Under the Criminal Procedure Code an acquittal means more than a discharge. A discharge takes place before a finding of 'guilty' or 'not guilty' is recorded and the guilt or innocence of the accused is not *res judicata*. A discharge generally takes place either under section 209 in the chapter headed "Of inquiry into cases triable by the Court of Sessions or High Court" or under section 253 in the chapter headed "Of the trial of warrant cases by Magistrates." Both sections contemplate an inquiry into some alleged offence and as a result a discharge before any charge is framed against the accused. A discharge may also take place under section 494, which again illustrates the general rule of the Code that a discharge should precede the framing of a charge. I do not however say, and must not be understood as saying, that an accused cannot be discharged otherwise than under the specific provisions referred to. So much for the meaning of the term 'discharge'.

In the present case the petitioner was acquitted of an offence under section 465 of the Penal Code. With that acquittal the Sessions Judge had no power to interfere. But an offence under section 467 being exclusively triable by the Court of Sessions, the petitioner under clause (4) of section 403 was (and is) still liable to be tried for that offence, the acquittal under section 465 not operating as a bar, and if the petitioner can be said to have been discharged in respect of any such offence, it was competent to the Sessions Judge to direct his committal.

In my opinion the acquittal of the petitioner on the charge actually framed does not necessarily imply that the Magistrate discharged him in respect of any other charge which might have been framed. Nor does the mere omission of the Magistrate to frame a charge

under section 467 carry the case further. So far as the record shows, the Magistrate never considered whether the accused had or had not committed an offence under section 467. His mind was never directed to that issue and it was not inquired into. It is not sufficient to say that the result is the same as if the petitioner had been discharged. That argument might be stretched to cover a case in which an accused has never been placed before a Magistrate at all. Clearly the mere fact that an accused has not been charged with an offence is in itself insufficient. At least the Magistrate must consciously do something or make some order which shows that in his opinion, on the materials before him, the accused should not be charged with, or tried for, that offence.

*Prima facie*, therefore, as section 436 is worded, I should hold that the petitioner was not discharged either properly or improperly, in respect of the offence now alleged under section 467 and that the learned Sessions Judge had no power to direct his committal, or to order a further inquiry under proviso (b.)

The learned pleader for the petitioner referred to the decision of this Court in the case of *Baijanath Pandey v. Gauri Kanta Mandal* (1) a decision which has been followed in Madras (*Queen Empress v. Hanumantha* (2)). Those cases, no doubt, support the view which I have expressed, but they go further than is necessary in the present case. In both cases the Magistrate had taken action which amounted to a refusal to charge the petitioner with the offence exclusively triable by the Court of Sessions in respect of which the Sessions Judge had afterwards directed a committal. Moreover, *Hanumantha's case* (2) was overruled and *Baijanath Pandey's case* (1) was dissented from, by a Full Bench of the Madras High Court in *Krishna Reddi v. Subbamma* (3). There the Magistrate refused the request of the prosecution that he should frame a charge under section 477 of the Penal Code and acquitted the accused on certain other charges. His order refusing to frame a charge under section 477 was held to be in substance an order discharging the accused in respect of the offence alleged under that section. In cases arising under section 437 of the Criminal Procedure Code it has been similarly held in this Court that an order though not in terms of an order of discharge may amount to such an order (see *Ajab Lal Khirher v. Emperor* (4)).

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(1) (1893) I. L. R. 20 Cal. 633.

(2) (1899) I. L. R. 23 Mad. 225.

(3) (1900) I. L. R. 24 Mad. 136.

(4) (1905) I. L. R. 32 Cal. 783.



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The cases of *Queen-Empress v. Gundyia* (1) and *Ayyan v. Vellayappa* (2) which were also cited before us are not precisely in point. They show, however, that the proceedings of the Magistrate were not void under section 530 (p) of the Criminal Procedure Code.

For present purposes it is sufficient to say that the Magistrate made no order which was either in terms or in substance an order of discharge, and that the learned Sessions Judge therefore had no power to direct the petitioner's committal to the Sessions Court for trial. In that view the Rule must be made absolute and the order of the Sessions Judge must be set aside.

Teunon, J.—As at present advised I am inclined to hold that the Magistrate's order acquitting the accused of an offence under section 465 of the Indian Penal Code is tantamount to an order discharging the accused of the graver offence in respect of the same document punishable under section 467. That no charge was framed and that the Magistrate was in fact not moved to frame a charge under the graver section, I am inclined to think is immaterial. I therefore reserve to myself the right at a fitting opportunity to refer to a Full Bench the question whether the case of *Baijanath Pandey v. Gauri Kanta* (3) was rightly decided. Meanwhile in the present case I assent to the order proposed by my learned brother and I do so all the more readily as in view of the provisions of section 403, sub-section (4) of the Code of Criminal Procedure it appears to be open to the Crown or to the complainant to take such further action as their respective legal advisers may deem appropriate.

A. T. M.

*Rule made absolute.*

(1) (1889) I. L. R. 13 Bom 502.

(2) (1901) I. L. R. 24 Mad. 675.

(3) (1893) I. L. R. 20 Calc. 633.

## FULL BENCH.

*Before Sir Lancelot Sanderson, Knight, Chief Justice, Sir John Woodroffe, Knight, Judge, Sir Asutosh Mookerjee, Knight, Judge, Mr. Justice Fletcher and Mr. Justice Richardson.*

AMRITA LAL BOSE AND OTHERS

v.

THE CORPORATION OF CALCUTTA.\*

*Calcutta Municipal Act (III B. C. of 1899), section 559—Bye-laws 83 and 85, whether ultra-vires—Continuance of performance at Theatre after 1 A.M.—Liability to punishment for breach, whether joint or several.*

Bye-law 85 framed under section 559 cl. (52) of the Calcutta Municipal Act which is to the effect that every person guilty of a breach of any of the bye-laws shall be punishable with a fine which may extend to Rs. 20 and in case of continuing the breach with a fine of Rs. 10 for every day during which the breach continues after the continuance of the first breach, is not *ultra vires*.

Where several persons have been jointly convicted of a breach of bye-law 85 framed under section 559 of the Calcutta Municipal Act which prohibits the continuance of performance at a Theatre after 1 A.M., each person so convicted is liable under bye-law 85 to be punished with the maximum amount of the prescribed fine.

The case of *Amrita Lal Bose v. Corporation of Calcutta* (1) was not correctly decided.

Per Mookerjee J. (Woodroffe J. concurring). All who participate in the commission of a crime are severally responsible to the State, as though the crime has been committed by any one of them acting alone: there is *prima facie*, no such thing as division of responsibility among the several participants in a crime. It is open to the legislature to depart from this principle and to rule that where a particular offence has been committed by several persons jointly, one collective sentence should be inflicted upon them jointly; but the legislative intent to depart from this principle must be established beyond all reasonable doubt.

*R. v. Clark* (2) commented on.

The facts of the case appear sufficiently from the following order of reference by Teunon and Newbould JJ.

### ORDER OF REFERENCE.

Teunon, J.—These six Rules were issued at the instance of three petitioners Amrita Lal Bose, Hari Prosad Bose and Dasu Charan Neogi. These three persons, it is admitted, are the co-sharer owners

\* Full Bench Reference in Criminal Revision Cases Nos. 13 to 18 of 1917, against sentences by Mr. N. N. Gupta, Municipal Magistrate, Calcutta.

(1) (1917) 26 C. L. J. 29. (2) (1770) 2 Cowper 610.

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of a theatre known as the Star Theatre situated in Cornwallis Street in the town of Calcutta and each, it appears, takes an active part in the management thereof.

On the 2nd, 5th, 6th, 9th, 12th and 13th November the performance at this Theatre was continued beyond the hour of 1 A.M. Six prosecutions were therefore instituted against the petitioners, who in each case were convicted on admissions made on behalf of all by their authorised agent, and sentenced each to pay a fine of Rs. 20. In each case an application was made to this Court on the 2nd of January 1917 and the six Rules now before us were issued calling upon the Municipal Magistrate and the Chairman of the Corporation to show cause why in each case the sentences complained of should not be modified.

By section 559 of the Calcutta Municipal Act, 1899, Clause (52), it is provided that the General Committee may make bye-laws for the regulation of Theatres and other places of public resort, recreation or amusement.

In section 561 it is next enacted that in making a bye-law under section 559, the General Committee may provide that a breach of it shall be punishable with fine which may extend to Rs. 20. Of the bye-laws made by the General Committee under section 559 (52), the 83rd provides with a certain exception which has no application here, that no performance shall be continued later than 1 A. M. The penalty is to be found in the 85th bye-law which says "Every person guilty of a breach of any of these bye-laws shall be punishable with fine which may extend to twenty rupees."

Thus in each of the six Rules the only question is whether in view of the provisions of section 561 of the Act the imposition of a fine of Rs. 20 on each of the three petitioners, *i. e.*, of a fine or fines exceeding in the aggregate Rs. 20 is authorised by law.

This same question, I may now observe, arose in *Amrita Lal Bose v. Corporation of Calcutta* (1). In that case the conviction was in respect of an offence committed by the same three petitioners on the 3rd of September 1916. The Rule then issued at their instance was obtained on the 1st of December and eventually came on for hearing on the 18th of January. The Judges (Chaudhuri, J., and myself) having differed in opinion the case was referred to Chitty, J., who in agreement with Chaudhuri, J., delivered judgment on the 19th of February holding that a fine or fines exceeding Rs. 20 in the aggregate were not permissible. When on the 13th March the present Rules came on for hearing before the Bench as now con-

stituted, learned counsel (Mr. K. N. Chaudhuri) appearing for the petitioners contended that we had no jurisdiction to hear them. This contention appeared to resolve itself into two branches, the first being that we were bound by the decision of Chitty and Chaudhuri, JJ., in *Amrita Lal Bose v. Corporation of Calcutta* (1). That, however, is not so. On the 18th of January there was but one Rule or case No. 1215, before the Court. No reference was made at the hearing to these later Rules, and in fact at that time the returns to these Rules and the explanation or statement which under section 441 of the Code, the Magistrate is entitled to submit had not been received. No doubt it was open to the petitioners or to learned counsel appearing on their behalf to apply that the hearing of the first should be postponed until the later Rules could be heard with it. But this course was not taken and the only case heard on the 18th January and decided by Chitty and Chaudhuri, JJ., on the 19th of February was Criminal Revision No. 1215 of 1916. It cannot be questioned that any Divisional Bench of this Court may differ from any other Divisional Bench on a question of law and in these cases, the question involved being one of great public importance, we both felt that we ought not to follow the previous decision without further examination of the grounds on which it was based.

It was next contended that as one of the Judges composing the present Bench (*i.e.* myself) was one of the Judges who had heard Revision No. 1215 on the 18th January and had then expressed an opinion contrary to the decision ultimately arrived at, the Bench so constituted had no jurisdiction to hear the present Rules. This appears to be a novel doctrine which if given effect to would dislocate the business of this Court. An examination of the constitution of the Full Benches formed from time to time will show that an expression of opinion by a Judge on a question of law does not debar him from hearing and dealing with the same question on a subsequent occasion. I need refer only to the recent Full Bench, [*Charu Chandra Majumder v. The Empress* (2)] which decided Criminal Revision No. 848 of 1916 on the 4th of December last and the Full Bench [*Queen-Empress v. Srichurn* (3)] which on the 20th of December 1895 overruled the decision of Petheram, C. J., and Beverley, J., in the case of *Prosanna Kumar Patra v. Uday Sant* (4) decided on the 30th of April of that same year.

No doubt if learned counsel appearing on behalf of the petitioners had felt genuinely embarrassed in his argument by the composition

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(1) (1917) 26 C. L. J. 29.

(2) (1916) 25 C. L. J. 165.

(3) (1895) I. L. R. 22 Calc. 1017.

(4) (1895) I. L. R. 22 Calc. 669.

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of the Bench, it was open to him to represent this to the Court and to apply with the courtesy due to the Bench that we should move his Lordship the Chief Justice to transfer these cases to some other Bench. To such an application so made we would have lent a ready ear. But this course was not taken, and to a claim advanced as of right, advanced too with unbecoming heat and discourtesy we could not accede.

Having made his observations on the question of jurisdiction, learned counsel next intimated that he did not propose to argue the matter further and on the merits, therefore, we have not had the benefit of his assistance.

We may now return to the question of law involved in the present Rules. Mr. Manmatha Nath Mukherjee, to whom we are much indebted, appearing for the Corporation, has placed before us all the authorities on which, so far as can be gathered, the petitioners rely. The following English cases have been referred to: *Rex v. Clark* (1); *Regina v. Dean* (2); *Queen v. Littlechild* (3), also *Crepps v. Durdan* (4). The only Indian authority cited in this connection was the case of *Reg. v. Showdar Ghenar* (5); but my attention has since been drawn to the case of *Gungadhar Sahoo and two others* (6). In *Reg. v. Showdar Ghenar* (5) decided in 1870, Westropp, C. J., elaborately discussed the earlier English cases, and following apparently the case of *Reg. v. Rowan McNaghten* (7). *The King v. Bleasdale* (8); *Hardyman v. Whitaker* (9) and *Partridge v. Naylor* (10), held that on the language of Regulation XXI of 1827, section 4, only one forfeiture of double the amount of the duty plus double the value of the opium in question had been incurred. It is not for me to question the decision of a Full Bench of the Bombay High Court on a Bombay Regulation, but it may be noticed that in the case of *Reg. v. Vakatchand* (11), an earlier Full Bench consisting of six Judges of the same Court had taken the contrary view. For present purpose it is sufficient to observe that the Regulation under consideration in both the Bombay cases above referred to was of a date long prior to the enactment of the Indian Penal Code in 1860. Similarly the case of *Gungadhar Sahoo* (6) was decided on the language of section 17 of Bengal Act VII of 1864, while the definition of

(1) (1770) 2 Cowper 610.

(2) (1843) 12 M. &amp; W. 39.

(3) (1871) L. R. 6 Q. B. 293.

(4) (1777) 1 Sm. L. C. 657; 1 Cowper 640.

(5) (1870) 7 Bom. H. C. R. (Cr. Cases) 39.

(6) (1874) 22 W. R. Cr. 9.

(7) (1845) 9 Ir. L. R. 93.

(8) (1792) 4 T. R. 809.

(9) (1749) 2 East. 573.

(10) (1596) Noy. 52.

(11) (1863) 1 Bom. H. C. R. 50.

offence (section 40 of the Code) was not extended to acts punishable under local or special laws until 1870 by Act XXVII of that year. Moreover, the decision in *Gingadhar Sahoo* (1) appears to have proceeded in part on the fact that the two persons convicted in each of the two cases then in question were master and servant and on the view that the custody of the servant (whom the Court acquitted) was the possession of the master.

In the view I take, the English cases, in so far as they discuss the distinction between offences single (or joint and indivisible) in their nature and offences several in their nature are of no authority here in India.

But the general rule, and in my opinion the only general rule laid down in these cases, and also in the case of *Reg. v. Showdar Ghenar* (2) is that in each case the question must be determined by the language of the particular statute. That rule is equally applicable in England and in India.

Here, therefore, we have to construe section 561 of the Calcutta Municipal Act, and that Act is again to be read in the light of Bengal General Clauses Act, 1 of 1899, and also in the light of certain sections of the Indian Penal Code which, as is well known, was intended to replace the pre-existing criminal law.

It cannot, we think, be questioned that the breach of a bye-law made under the provisions of the Calcutta Municipal Act is a "thing punishable" under a special or local law. To things so punishable, section 40 of the Code, as amended by Act XXVII of 1870, extends the provisions, *inter alia* of section 109 of the Code. Similarly, section 3, clause (1) of the Bengal General Clauses Act, we may observe, provides that unless there is anything repugnant in the subject or context the word 'abet' shall have the same meaning as in the Indian Penal Code. Section 109 of that Code provides in substance that whoever abets any offence shall be punished with the punishment provided for the offence. Persons who in concert commit an offence are treated each as having abetted the other. That is the case here. The three petitioners, the co-sharer owners and managers of this Theatre, it has been found, combined to continue the performance on the nights in question beyond the closing hour. They acted in concert, and there is no suggestion that in keeping the Theatre open anyone or two of them acted in defiance of the wishes of the others.

In my opinion, therefore, having regard to the provisions of sections 40 and 109 of the Indian Penal Code, they are individually liable to the full penalty provided for the offence.

(1) (1874) 22 W. R. Cr. 9. (2) (1879) 7 Bom. H. C. R. (Cr. Cases) 39.

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Apart, however, from the sections of the Indian Penal Code which in my opinion, are applicable and therefore must be applied, on the language of the section itself, I come to the same conclusion. The breach of a bye-law is an offence. The section (section 561) provides in effect that this offence "shall be punishable with" fine which may extend to twenty rupees. There is nothing unique in this language. In section 40 of the Indian Penal Code an offence is spoken of as a "thing made punishable by" or "punishable under the Code or a special or local law" as the case may be. Similarly, sections 64 and 67 speak of "offences punishable with fine" or "imprisonment" and so forth but when we come to the operative or punitive sections punishment for each individual offender is provided. In this connection the Criminal Procedure Code and also some other special laws may be referred to. I need not, however, elaborate this argument. In my opinion when the section provides that the offence consisting in the breach of a bye-law shall be punishable with fine which may extend to rupees twenty it means and provides that such offence in every individual offender guilty thereof is punishable to that extent.

The last contention put forward in the application of the petitioners is that they being joint owners of the Theatre in question are "one person" for the purposes and within the meaning of the 83rd and 85th bye-laws.

This contention appears to be based on the Bengal General Clauses Act, section 3, clause (32), which says that unless there is anything repugnant in the subject or context "person" shall include any company or association or body of individuals whether incorporated or not. On this definition it may be that where rights are specially conferred or obligation specifically imposed upon the 'owners' of premises these three co-owners are for such purposes to be considered as one. But here the case appears to me to be different. A breach of this bye-law, which consists in the continuance of a performance beyond a stated hour, may, I venture to think, be committed by the individual actor, the manager, the proprietor and by all aiding and abetting them in the continuance thereof. Further under the definition on which reliance is placed three persons can be treated as one only when there is no repugnancy in the subject or context. Here and in Indian penal legislation in general, in my opinion, there is such repugnancy and in further support of this view I should refer to section 26 of the Bengal General Clauses Act which provides *inter alia* that in the absence of express provision to the contrary section 64 of the Indian Penal Code "shall apply" to all fines imposed under any Bengal Act. Section 64 of the Code provides that in every case

of an offence punishable with fine only, it shall be competent to the Court to direct that in default of payment the offender shall suffer imprisonment. No doubt in the case of *Basanta Kumari Debi v. The Corporation* (1), a Bench of this Court held that in the case of the bye-law then before them imprisonment could not be imposed. But with all respect to the learned Judges who so decided, I am unable to agree in the view which then found favour. Neither in that case nor in this does the act or bye-law contain any express provision to the contrary, and I am therefore of opinion that that case was wrongly decided, and in this connection I may refer to the case of *In re Lakmia* (2). Further the case of *Basanta Kumari* (1) may be distinguished inasmuch as the Court was there dealing with a continuing breach.

The liability of the offenders to imprisonment would seem to negative the contention that three offenders can be held to constitute one 'person.'

To sum up, I am of opinion that when section 561 of the Calcutta Municipal Act provides that a breach of a bye-law shall or may be punishable with fines which may extend to twenty rupees it provides that the offence shall be so punishable in each and every individual offender, that bye-law 85 is, therefore, not *ultra vires*, and that three offenders cannot be considered to be one person within the meaning and for the purposes of the section and of the bye-laws now in question.

I am, therefore, of opinion that the present Rules should be discharged.

**Newbould, J.**—The question that arises in these Rules is whether the Magistrate had power to impose on each of the three petitioners the full penalty provided by law for the breach of a bye-law of the Calcutta Municipality. The same question arose recently, when the same petitioners were convicted of a breach of the same bye-law, and it was held by Chitty and Chaudhuri JJ., Teunon J. dissenting, that the total amount of the fines imposed on the petitioners could not exceed the sum of Rs. 20, the full penalty provided for the offence. When these Rules came up for hearing, the learned counsel for the petitioners contended that this previous decision was binding on us and we must make these Rules absolute, and had no jurisdiction to do otherwise. He refused to assist us by arguing in support of these Rules or in reply to the arguments of the learned pleader for the respondent in support of our having jurisdiction. On this point, I think it unnecessary to add anything to the remarks of my learned brother with which I entirely agree.

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(1) (1911) 15 C. W. N. 906.

(2) (1893) I. L. R. 18 Bom. 400.



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The offence of which the petitioners were convicted on their plea of guilty was a breach of bye-law 83 duly made by the General Committee of the Calcutta Municipality, under section 559 (52) of the Calcutta Municipal Act III (B.C.) of 1899. This bye-law is as follows:—

“Hour of closing Theatres. No performance shall be continued later than 1 A.M., unless with the particular permission of the Chairman for any particular occasion.” The penalty clause of these bye-laws made under section 561 of the same Act is to the following effect:—“Every person guilty of a breach of any of these bye-laws shall be punishable (a) with fine which may extend to twenty rupees . . .” It is unnecessary to quote the remainder of the clause which relates to continuing breaches. To me it seems perfectly clear that under this penalty clause each of the petitioners who has committed a breach of bye-law 83 is punishable with a fine of Rs. 20. I will consider later the question whether this penalty clause is *ultra vires*. Assuming that it is not, I find myself unable to agree with my learned brother Chitty J., that the dictum of Lord Mansfield in *Reg. v. Clark* (1) supports the contention of the petitioners in the present case. This case and other English cases on the point are discussed by Westropp C. J. in *Reg. v. Showdar Ghenar* (2). He states “the English decisions would appear to show (I) that if the penalty be imposed by an Act of Legislature upon each person convicted even where the offence would in its nature be single, or (II) if the quality of the offence be such that the guilt of one person may be distinct from that of the others in either of these cases the penalties are several.” Now in *Reg. v. Clark* (1), Mr. Buller in support of the Rule argued “only one penalty can be recovered.” For it is not said “that every person offending shall for every such offence forfeit” but “if any person or persons shall, etc., the party or parties shall for every such offence forfeit and lose £40.” Lord Mansfield in his judgment did not discuss that argument but discharged the Rule on the ground the offence in that case was in its nature several and not single. There is nothing in his judgment to contradict the first portion of Lord Westropp’s concise statement of the effect of the English decisions namely that even where the offence would in its own nature be single, the penalties are several if the penalty be imposed by an Act of the Legislature on each person convicted. I have considered the English cases referred to in *Reg. v. Showdar Ghenar* (2),

(1) (1770) 2 Cowper 610.

(2) (1870) 7 Bom. H. C. R. (Cr. Cases.) 39.

and cannot find any of them contradict the rule that where the enactment makes "every person" offending liable to the penalty, separate penalties can be imposed on each person. The only case that seems at all to support the petitioners' contention is *Partridge v. Naylor* (1), in which in spite of the words of the Act making "every person offending" liable to forfeit £5, it was held that but one £5 shall be forfeited, in an action against three persons. But as pointed out by Westropp, C. J., at pages 46 and 47 of the report abovementioned, this is a very peculiar case and can be distinguished on the ground that this was a civil action by a private person and the penalty was of the nature of compensation rather than fine.

The decision in *Reg. v. Showdar Ghenar* (2) itself does not help the petitioners. In that case it was held that only one penalty was leviable because the words of the enactment infringed (Regulation XXI of 1827, section 4) were not "every person shall forfeit" but "any person or persons" (page 45). It was also pointed out in the judgment of Couch, C. J. (page 40) with which Westropp, C. J. concurred that the penalty not being a fixed sum but varying according to the quantity of opium kept or concealed is more consistent with its being a single one than with there being several penalties. I draw special attention to this remark because, in the only case of this Court, which I have been able to find containing a reference to *Reg. v. Showdar* (2), namely *Gangadhar Sahoo* (3), that decision was approved on the ground that in that case also the sum in which the parties were liable to be fined was not a fixed one being liable to vary according to the quantity of contraband salt found in their possession.

I now come to the question whether this penalty clause of the bye-laws is *ultra vires*. The section of the Calcutta Municipal Act under which it was made in section 561, which, excluding the portion relating to a continuing breach, runs as follows :—"In making a bye-law under section 559 the General Committee may provide that a breach of it shall be punishable (a) with a fine which may extend to twenty rupees...."

I cannot find in these words any restriction preventing the General Committee from providing, as they have done, that every person guilty of the breach of a bye-law shall be punishable with a fine which may extend to twenty rupees. Whatever may be the law in England, it appears that the Indian legislature has made no distinc-

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(1) (1596) Noy. 52.

(2) (1870) 7 Bom. H. C. R. (Cr. Cases) 39.

(3) (1874) 22 W. R. Cr. 9.

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tion between the punishment of an offence and the punishment of an offender. The expression punishment of an offence must connote the punishment of an offender. One cannot hang a murder or imprison a theft. The Indian Penal Code refers indiscriminately to offenders being punishable and offences being punishable. For example see sections 59 and 60 for the former expression and sections 62 and 64 for the latter. The words "offence punishable" are a convenient and compact expression for a longer phrase such as "an offence for which a person who has committed the same is punishable." Another example of the use of the expression offence punishable being used in this sense may be found in the Bengal Excise Act, 1909. Section 46 of that Act provides for the punishment of persons and section 56 refers to "any offence punishable under section 46." Also in section 40 of the Indian Penal Code it is stated that "the word offence denotes a thing made punishable by the Code." But all the operative sections of the Code by which offences are made punishable commence with the word "whoever" and expressly provide for the punishment of the person committing the offence. There is nothing in the Calcutta Municipal Act to suggest that the Legislature when it empowered the General Committee "to make a breach punishable" used the words in any other sense than that in which the words "offence punishable" are used in the Penal Code. The words used are capable of easy interpretation and it is therefore unnecessary to consider the intention of the legislature. If it were, I should hold that it was highly improbable that they intended to prevent the imposition of more than one sum of Rs. 20 for a breach of this bye-law irrespective of the number of persons who committed the breach. The number of convictions of the present petitioners shows that a single fine of this amount is insufficient as a deterrent. Unless more persons than one can be separately punished for these offences it obviously pays the owners of any popular theatre to treat the bye-law with contempt. For these reasons I am of the opinion that the penalty clause under which the petitioners have been separately convicted is *intra vires* of section 561 of the Calcutta Municipal Act.

The only other point to be considered is whether the three petitioners constitute a single person and are liable to a single fine on this account. It appears from the evidence of their agent on whose admission they were convicted that as well as being partners, they each take an active part in the management of the theatre. The first petitioner is the Dramatic Director, the second is the Business Manager, and the third sells tickets. On this I would hold that they have been convicted for their individual acts and not as a body of

individuals forming a person within the definition of that word given in clause (32) of section 3 of the Bengal General Clauses Act I (B.C.) of 1889. But in any case that definition cannot apply in the present Act since the subject of a Penal clause is repugnant to such an interpretation. I am unable to agree with the decision of a Bench of this Court in *Basanta Kumari Debi v. The Corporation of Calcutta* (1), that imprisonment cannot be enforced under section 64, Indian Penal Code, for non-payment of a fine for an offence under the Calcutta Municipal Act. Section 40 of the Indian Penal Code and section 26 of the Bengal Clauses Act, seem to me to clearly apply. But this case can be distinguished on the ground that the Judges deciding it only dealt with the question of a daily fine for a continuing breach and expressly held it unnecessary to discuss the effect of the General Clauses Act and made no reference to section 40, Indian Penal Code. Since these offences are punishable with imprisonment in default of payment of fine, the three petitioners cannot be treated as a single person as the imprisonment could not be apportioned.

But for the recent decision in the similar case referred to at the commencement of my judgment I would discharge these Rules, but as that cannot be done the case must be referred for decision to a Full Bench.

For the reasons given in our separately recorded opinions we are agreed that the six cases before us should be referred, under Part II, Chapter V, Rule V of our Rules, to a Full Bench for such orders as to such Bench may seem fit.

The question for the determination of the Full Bench we state as follows :—

“Was the case of *Amrita Lal Bose v. The Corporation of Calcutta* (2) being Criminal Revision No. 1215 of 1916, rightly decided?”

*Messrs. Norton and K. N. Choudhury and Babu Hemendra Nath Sen* for the petitioners.

*Mr. B. C. Mitter*, (officiating Advocate-General) and *Babu Manmatha Nath Mookerjee* for the Opposite Party.

On the question being raised as to who should begin.

*Mr. Norton*—I am ready to begin, but the practice is for him to begin who supports the referring Judges.

*The Advocate General*—It is for him who attacks the judgment of the referring Judges, to begin (*vide Guznavi's case*) (3).

*Mr. Norton* opened the case. Three persons who are partners were prosecuted before the Municipal Magistrate for the breach of

(1) (1911) 15 C. W. N. 906.

(2) (1917) 26 C. L. J. 29.

(3) (1917) 26 C. L. J. 49.

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bye-law 83 framed under section 559 clause 52 and section 561 of the Calcutta Municipal Act. The bye-laws having been framed under the statute cannot go beyond the statute. Section 561 lays down that in making a bye-law under section 559 the General Committee may provide that a breach of the peace shall be punishable with a fine that may extend to Rs. 20 and in a case for continuing the breach with a fine which may extend to Rs. 10 for every day during which the breach continues after conviction for the first breach, or with a fine which may extend to Rs. 10 for every day during which the breach continues from the receipt of the written notice from the Chairman to discontinue the breach.

In the bye-law 85 therefore the intention must be taken to punish the breach and not to punish each separate offender. A contrary intention would be *ultra vires* of the statute. Under no circumstance therefore could a single breach be punishable with a fine of more than Rs. 20 whatever may be the number of the offenders concerned.

Refers to the cases cited in the referring order and discusses them. Refers also to section 628 of the Calcutta Municipal Act, and contends that in dealing with a case before him the Municipal Magistrate is limited to the provisions of the Calcutta Municipal Act, and the provisions of the Indian Penal Code or of any other law regarding abetment etc. cannot be read into the Calcutta Municipal Act.

*The Advocate General.*—The intention of the legislature under section 561 of the Calcutta Municipal Act seems to be to leave it to the General Committee to deal with the matter in framing bye-laws. It is curious to see how Chitty J. speaks of the offence to be single and individual and at the same time when he comes to the question of fine he finds the offences of the different persons to be separate.

Refers to section 2 clause 32, sections 21 and 26 of the Bengal General Clauses Act, also sections 177, 195 Criminal Procedure Code and section 140, Indian Penal Code and also discusses the cases referred to in the order of reference. In the English cases some particular statute or statutes were under consideration, but here in India the law is different. There is a breach by each offender and the intention of the Indian legislature seems to be to deal with the offences of each offender separately. Refers to other penal statutes in force in India.

*Mr. Norton* in Reply—If the act is entire and single in itself the punishment must also be single, that has been the law ever since the day of Lord Mansfield.

C. A. V.

The judgments of the Court were as follows :

**Sanderson, C. J.**—This matter refers to six Criminal Revision Cases, Nos. 13, 14, 15, 16, 17 and 18 of 1917.

The question which has been referred to the Full Bench is as follows :—“Was the case of *Amrita Lal Bose and two others v. The Corporation of Calcutta*” (1) being Criminal Revision No. 1215 of 1916, rightly decided ?”

That Revision case was heard by Teunon and Chaudhuri, JJ., who were divided in opinion and the case was therefore under section 429 of Criminal Procedure Code, laid before Chitty J., who after hearing the case gave his opinion agreeing with that expressed by Chaudhuri J. Consequently, the judgment was in accordance with Chitty J.’s opinion and the question we have to consider is whether that decision was correct.

The matter arose in the following manner :—

Three persons, Amrita Lal Bose, Hari Prosad Bose and Dasu Charan Neogi, are joint proprietors of the Star Theatre, Cornwallis Street, Calcutta. A complaint was laid against them by the Corporation of Calcutta, alleging that on the 3rd September 1916 in breach of clause 83 of the bye-laws made under section 559 (52) of Calcutta Municipal Act of 1899, they had continued a performance at the Star Theatre later than 1 A. M.

On the 24th November 1916, one of the petitioners appeared before the Magistrate and admitted the offence charged, whereupon the Magistrate fined Amrita Lal Bose Rs. 20 and the other two petitioners Rs. 10 each, i.e., Rs. 40 in all.

The three individuals concerned petitioned the High Court and a Rule was granted by Teunon and Beachcroft, JJ., on the 1st December 1916, in Revision Case 1215 of 1916, calling upon the Magistrate to show cause why the order of the 24th November 1916 should not be set aside.

On 18th January 1917, the Rule was argued before Teunon and Chaudhuri, JJ., and as already stated the learned Judges differed in opinion, Teunon J. being in favour of discharging the Rule and Chaudhuri J. being of opinion that the Rule should be made absolute. When the matter was referred to Chitty J., he agreed with Chaudhuri J. Consequently, the Rule was made absolute: the conviction of the three petitioners was upheld but the penalty imposed was limited to Rs. 20 and it was ordered that it should be apportioned equally between the three petitioners. In the meantime prosecutions had been instituted with reference to six other cases against the same

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three persons. The allegation being that they had continued the performance at the Theatre after 1 A. M. on the 2nd, 5th, 6th, 9th, 12th and 13th November, 1916. They were convicted in each case and fined Rs. 20 each.

In each case Rules were issued by the High Court. On the hearing by Teunon and Newbould, JJ., of these Rules the same points were involved as on the hearing of the Revision Case No. 1215 of 1916, and these two learned Judges, disagreeing with the decision of Chitty J., in that case, have referred the matter to the Full Bench.

The question is whether the Magistrate in the case of *Amrita Lal Bose v. The Corporation of Calcutta* (1) had power to impose a fine exceeding the sum of Rs. 20 in respect of the offence alleged; it was contended that the Magistrate in imposing upon the joint proprietors the three fines, the total of which exceeded Rs. 20, had acted in contravention of the law.

The determination of this question depends upon the Calcutta Municipal Act, 1899, sections 559 (clause 52) and 561: and upon two bye-laws made by the General Committee under Section 559 (52), *viz.*, bye-laws 83 and 85. Section 559 (52) of the Calcutta Municipal Act, 1899, provides that the General Committee may make bye-laws for the regulation of theatres and other places of public resort, recreations and amusement: and section 561 provides that "in making a bye-law under section 559 the General Committee may provide that a breach of it shall be punishable (a) with fine which may extend to Rs. 20, and in the case of a continuing breach, with fine which may extend to Rs. 10, for every day during which the breach continues after conviction for the first breach."

Certain bye-laws were made under section 559 (52) of the Act for the regulation of theatres and one of them, *viz.*, bye-law 83 provides that "no performance shall be continued later than 1 A. M. unless with special permission of the Chairman for any particular occasion" and 85 provides that "every person guilty of a breach of any of these bye-laws shall be punishable—(a) with fine which may extend to Rs. 20, and in case of a continuing breach with fine which may extend to Rs. 10 for every day during which the breach continues after conviction for the first breach."

The main contentions urged by learned counsel on behalf of the petitioners were (1) that the offence was, in its nature, single, and that the penalty was also single, in other words, that although all the petitioners could be convicted of the offence the Magistrate could

not impose a fine of more than Rs. 20 in respect thereof. (2) That if bye-law 85 enabled the Magistrate to impose a fine upon each person convicted of the offence, so that the total of the fine exceeded Rs. 20 the bye-law was "*ultra vires*." (3) That it was not necessary to hold that the bye-law was "*ultra vires*" because of the definition of the word "person" in the Bengal General Clauses Act, 1899, section 3 (32) which provides that unless there is anything repugnant in the subject or context "person" shall include "any company or association or body of individuals whether incorporated or not," and that consequently the word person would include the three petitioners as joint proprietors of the Theatre and that they could properly be regarded as a "person" for the purpose of bye-law (85).

We were referred to several cases as to the construction to be placed upon statutes dealing with the imposition of penalties for the breach of an offence, but there can be no doubt as to the principle of construction which should be applied to this matter. It is as follows:—

"If either the penalty be imposed by the Act upon each person convicted even where the offence would in its own nature be single, or if the quality of the offence be such that the guilt of one person may be distinct from that of the others in either of these cases the penalties are several," see *R. v. Littlechild* (1), per Hannen J., at page 296.

In each case the question must be determined by the language of the particular statute.

In this case we have to consider not only the Act but also the bye-laws made under the Act. It was urged that the offence was single in its nature even when committed by three persons: of this I am not satisfied, but I do not think it is necessary to express any definite opinion thereon, for on a true interpretation of the bye-laws 83 and 85, I think there is no doubt that it was the intention of those framing the bye-laws to impose upon each person convicted of a breach of the bye-law 83 a fine to the extent mentioned in bye-law 85. I think the words used in bye-law 85 make that clear.

In my judgment this interpretation of the bye-law is not inconsistent with the definition of the word "person" in the Bengal General Clauses Act, 1899, section 3 (32). The three petitioners are alleged to be joint proprietors of the Star Theatre: With great deference to the learned Judges who have held the contrary view, I have considerable doubt whether the petitioners merely because they are carrying on the Theatre jointly could be said to come within any of the expres-

(1) (1871) L. R. 6 Q. B. 293.

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sions mentioned in the section, *viz.*, "any Company or Association or body of individuals, whether incorporated or not." Even if they do, the section is not an exhaustive definition of the word "person" but only provides that the word "person" shall *include* certain bodies of individuals, which without such definition might not be affected by the provisions of the Act in question; and in my judgment, it does not prevent the bye-law 85 from applying to the three petitioners, each of whom, according to the statement made by one of the petitioners, as recorded in the Magistrate's letter of explanation in *Amrita Lal Bose v. Corporation of Calcutta* (1), in his individual capacity taking some part in the management of the Theatre.

It is said, however, that if this is the correct interpretation of bye-law 85, it is '*ultra vires*' by reason of the provisions of section 561. This section, as already mentioned, provides, that in making a bye-law under section 559, the General Committee may provide that a *breach of it shall be punishable*, (a) with fine which may extend to Rs. 20, etc.

The question, therefore, is whether the terms of that section are such as to prevent the General Committee from making a bye-law which imposes a fine to the extent of Rs. 20, upon *each* person who is guilty of a breach of the bye-law in question. The expression in the Act, "the Committee may provide that a breach of it shall be punishable" with a fine which may extend to Rs. 20, obviously involves the punishment of an offender or offenders; but the incidence of the fine with reference to such offender or offenders was not dealt with in the Act itself, and I think the intention was to leave it to the General Committee to make bye-laws dealing with that matter.

In my judgment, therefore, bye-law 85 is not "*ultra vires*" and by the express terms of that bye-law, each of the petitioners was liable to be fined to the extent of Rs. 20 for the breach of bye-law 83.

I do not think that this case is covered by the decision in *R. v. Showdar Ghenar* (2). In the first place that was not a case such as we have before us of a general provision in an Act with a power to a Municipal body to make bye-laws for the purpose of carrying out in detail the general provision, but the offence and punishment were dealt with in one Regulation which the Court had to construe.

Secondly, as Couch, C. J., pointed out at page 40, "the penalty not being a fixed sum but varying according to the quantity of opium kept or concealed was more consistent with its being a single one

(1) (1917) 26 C. L. J. 29.

(2) (1870) 7 Bom. H. C. R. (Cr. cases) 39.

than with there being several penalties." In this case the penalty is a fixed sum. There might have been some analogy between the two cases, if, *exempli gratia*, instead of a fixed sum there had been a provision that the penalty should vary according to the amount of the takings at the performance of the theatre. Further it seems to have been suggested by Westropp, C. J., at page 45, that if the Regulation had contained words similar to those found in the bye-law now under consideration, *viz.*, "every person offending against this Regulation," the decision in that case might have been different.

In the case under consideration the penalty of Rs. 20 was directed to be apportioned equally between the petitioners, although the Magistrate had fined one petitioner Rs. 20 and the other two Rs. 10 each. It has not been explained under what provision such an order of apportionment could be made: but if this could be done the anomalous result would occur that if a man committed a breach of the bye-law by himself, he would be liable to a fine of Rs. 20, but that if he and two others committed the breach, he would be liable for a third of that sum only.

For these reasons, in my judgment, the answer to the question addressed to us, should be that the Case of *Amrita Lal Bose v. Corporation of Calcutta* (1) was not rightly decided.

In my judgment, therefore, the Rule should be discharged in each of the abovementioned cases.

**Woodroffe, J.**—I agree with the judgment about to be delivered by Mr. Justice Mookerjee.

**Mookerjee, J.**—The question referred to the Full Bench for determination has been framed in the following terms:—

"Was the case of *Amrita Lal Bose and others v. Corporation of Calcutta* (1) rightly decided?"

It may be observed at the outset that the reference is not strictly in accord with Rule 5 of Chapter V of the Rules of Court, which provides as follows:—

"If the question arises in any case coming before a Division Court as a Court of Criminal Appeal, Reference or Revision, the Court referring the case shall state the point or points on which they differ from a decision of a former Division Court, and shall refer the case to a Full Bench for such orders as to such Bench may seem fit."

Consequently, what has to be referred to the Full Bench is the entire case, and the point or points on which the referring Division Court differs from the decision of the former Division Court has

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also to be stated: in other words, the question, that is, "the point of law or usage having the force of law" mentioned in Rule 1, should also be formulated. In these circumstances, it is necessary to specify the point of law involved in this reference.

Section 559 of the Calcutta Municipal Act, 1899, authorises the General Committee, by clause 52, to make bye-laws for the regulation of theatres and other places of public resort, recreation or amusement. Section 561 next provides, in the following terms, for the imposition of penalties for breaches of bye-laws:—

"In making a bye-law under section 559, the General Committee may provide that a breach of it shall be punishable—

(a) with fine which may extend to twenty rupees, and, in the case of a continuing breach, with fine which may extend to ten rupees for every day during which the breach continues, after conviction for the first breach, or (b) with fine which may extend to ten rupees for every day during which the breach continues after receipt of written notice from the Chairman to discontinue the breach."

The General Committee has framed bye-laws under section 559 (52), which have been duly sanctioned by the Local Government and published in the *Calcutta Gazette*. Bye-law 83 is in the following terms:—

"No performance shall be continued later than 1 A. M. unless with the special permission of the Chairman for any particular occasion."

Bye-law 85 is in the following terms:—

"Every person guilty of a breach of any of these bye-laws shall be punishable—(a) with fine which may extend to twenty rupees, and in the case of a continuing breach, with fine which may extend to ten rupees for every day during which the breach continues after conviction for the first breach, or (b) with fine which may extend to ten rupees for every day during which the breach continues after receipt of written notice from the Chairman to discontinue the breach."

In the case of *Amrita Lal Bose and others v. Corporation of Calcutta* (1) three persons, who were joint proprietors of the Star Theatre, were found to have committed a breach of bye-law 83, inasmuch as the performance at the theatre was continued beyond the prescribed hour on the night of the 3rd September 1916. The Municipal Magistrate convicted the accused persons, and imposed a fine of twenty rupees upon one of them and of ten rupees upon each of the others. The legality of this sentence was called in question before this Court on the ground that

it was not competent to the Magistrate to impose a fine of more than twenty rupees in the aggregate upon the three accused persons. This contention was upheld by Chitty and Chaudhuri JJ. (Teunon J., contra). According to the judgment of Chitty J., the penalty imposed was reduced from rupees forty to rupees twenty, to be apportioned equally between the three accused persons. There appears to have been other breaches of the bye-law in question at the same theatre on the 2nd, 5th, 6th, 9th, 12th and 13th November 1916. The joint proprietors were thereupon prosecuted and convicted as before, and as the cases were decided by the Magistrate before the pronouncement of the final decision by this Court in the case previously mentioned, he imposed a fine of twenty rupees upon each accused for each breach of the bye-law. These cases have been brought up to this Court for revision of the sentences as illegal and unauthorised by law. Teunon and Newbould, JJ., who have heard these six Rules, have expressed their dissent from the view of the law adopted by Chitty and Chaudhuri, JJ., and have referred the question for decision by a Full Bench. The question for determination by this Bench may, consequently, be formulated as follows:—

“When several persons have been jointly convicted of a breach of bye-law 83, are they jointly liable under bye-law 85 to pay a fine not exceeding twenty rupees, or, is each person so convicted liable to pay a fine which may extend to twenty rupees?”

The answer to this question depends upon the true construction of bye-law 85, read with section 561 of the Calcutta Municipal Act. Before we interpret section 561 whereon bye-law 85 is founded, we may usefully recall a fundamental principle which, as some of the cases in the books show, has not always been borne in mind.

The distinction between a tort and a crime, between a civil suit and a criminal proceeding, may be regarded as of an elementary character, and the same wrongful act sometimes gives rise to a civil as well as to a criminal liability. The purpose of the civil suit is to compel the defendant to compensate the plaintiff for what he has unjustly suffered while the object of the criminal proceeding is punishment and the cure of what may be called a public wrong. A crime is thus a wrong which the Government deems injurious to the public at large and punishes through a judicial proceeding, instituted in its own name or on its behalf. The line of demarcation between a civil and a criminal proceeding may sometimes be difficult to draw, and judicial opinion has differed in individual instances as to the true effect of a statutory proceeding, whether it is in its nature civil or criminal, or, as is sometimes said, *quasi civil or quasi criminal*.

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Reference may be made in this connection to *R. v. Charlay* (1), and *R. v. Russel* (2), and it may be noted that the mere fact of a fine no more shows that an indictment is a criminal proceeding than the ancient fine in trespass. As pointed out in a note to *R. v. Paget* (3), (where it was ruled that an indictment for the obstruction of a highway, intended to effect the removal of a nuisance is in substance a civil and not a criminal case) the distinction taken in the most ancient and approved authorities between a criminal and a civil proceeding is, whether the real end or object of the proceeding is punishment or reparation (*Mirror of Justices*, Ch. XI, section 3 : 1 Reeve's *Hist. Eng. Law*, 32). This fundamental distinction between a tort and a crime cannot be ignored or rejected, and leads inevitably to the position that while in a civil suit for damages, however numerous the wrong-doers, the plaintiff is to be compensated for his loss only once, in a criminal proceeding, where each wrong-doer is as guilty as though the others were not guilty also, the full penalty must be inflicted on each precisely as if he had committed the crime unaided. Indeed, from the point of view of criminal jurisprudence, the circumstances that the wrong-doer had participants in the commission of the crime, may sometimes make his position worse. In any event, where a crime has been committed jointly by two persons, the guilt of one is undoubtedly not mitigated, even though it may not be enhanced, from the fact that another may be also guilty. The essence of the matter is that the proceeding has been instituted not to indemnify a person to the extent of the loss he may have suffered from a wrongful act, but to inflict punishment on the wrong-doer for an act which the Government deems injurious to the public at large. From the point of view of principle, consequently, the rule must be deemed established beyond question that all who participate in the commission of a crime are severally responsible to the State, as though the crime has been committed by any one of them acting alone : there is *prima facie* no such thing as division of responsibility among the several participants in a crime. Based on this elementary truth the conclusion must be sustained that although joint actors in the commission of a crime are jointly tried and convicted, each must be separately punished as if he had committed the offence alone and must respond in full to his own separate sentence. I do not deny that it is open to the legislature to depart from this fundamental principle and to rule that where a particular offence has been committed by several persons jointly, one collective sentence should be

(1) (1848) 12 Q. B. 515.

(2) (1854) 3 E. &amp; B. 942.

(3) (1852) 3 F. &amp; F. 29.

inflicted upon them jointly ; but, in my opinion the legislative intent to depart from what I cannot but consider as a fundamental principle of criminal jurisprudence must be established beyond all reasonable doubt.

Reliance has been placed on behalf of the petitioners upon a passage in the work of Paley on the Law of Summary Convictions (8th edition, p. 287) where the rule is stated in the following terms :—"Though several offenders may be, as it seems, included in one conviction for offences jointly committed, it depends upon the wording of the particular statutes applicable to each case, and the quality of the offence, whether each person be liable to a distinct penalty or all collectively to but one." This formulation is based upon a long line of authorities which have an interesting history. The earliest case traceable in the reports is that of *Partridge v. Naylor* (1), which was an action of debt against three persons, upon 1 and 2 Ph. and M. C. 12, section 1, to recover a penalty for wrongfully impounding a distress. The Court of Error, reversing the divided judgment of the Court of Common Pleas, ruled that the judgment should be joint for one penalty against all. It should not be overlooked that the proceeding to recover the penalty under the statute was in form *civil*. In the next case, *R. v. Drake* (2) on a conviction of two persons under 13 Car. II C. 10, a statute enacted for the prevention of the unlawful coursing of deer in a forest, a separate penalty of the full amount was imposed upon each and was maintained, notwithstanding the contention that the design of the statute was to give only one satisfaction for the deer spoiled. In *R. v. King* (3) upon conviction of two persons under 3 Wm. and M. C. 10, section 2, a statute enacted for the prevention of deer-stealing, a separate penalty of the maximum amount was imposed upon each offender. Reliance was placed upon *Partridge v. Naylor* (1) but Powell J. overruled the contention on the ground that the penalty was not in the nature of a satisfaction to the party grieved, but a punishment on the offender ; and he added the important observation that "crimes are several, though debts be joint." The next case, *Marriott v. Shaw* (4) which arose upon a conviction under 5 Anne C. 14, section 4, for killing several hares on the same day, is of no real assistance, except to this extent that the acts were treated as one offence. No reason was assigned, however, in support of this view. In *Hardyman v. Whitakar* (5) which arose upon 12 Anne

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(1) (1596) Noy 52 (62) ; Moore 453 ; Goulds 145 ; Cro Eliz. 480.

(2) (1687) 2 Shower 489.

(3) (1712) 1 Salk. 182.

(4) (1718) 1 Comyns 274

(5) (1749) 2 East 573.

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C. 14, section 4, it was ruled that only one penalty was, under the terms of the statute, jointly payable by the persons who had, in contravention thereof, kept a lurcher to kill and destroy the game. The same view was subsequently taken with reference to the same statute, in *R. v. Bleasdale* (1). Meanwhile, the question had arisen for consideration before Lord Mansfield in *R. v. Clark* (2) where three persons had been placed on trial under 8 George 1, C. 18, S. 25, for assaulting and resisting Custom House Officers in the execution of their duty and rescuing out of their custody brandy and geneva which they had seized. It was argued that there was only one offence for which only one penalty could be inflicted. This contention was overruled; but Lord Mansfield proceeded to enunciate the principle applicable to cases of this character: "where the offence is in its nature single, and cannot be severed, there the penalty shall be only single, because though several persons may join in committing it, it still constitutes but one offence. But where the offence is in its nature several, and where every person concerned may be separately guilty of it, there each offender is separately liable to the penalty: because the crime of each is distinct from the offence of the others, and each is punishable for his own crime. For instance, the offence created by the Stat. 1 and 2 Phil., and Mar. C. 12, is "the impounding a distress in a wrong place." (a) One, two, three or four, may impound it wrongfully: it still is but one act of impounding: it cannot be severed. It is but one offence: and therefore shall be satisfied by one forfeiture. (b) So, under the Stat. 5 Anne C. 14, for the preservation of the game: killing a hare is but one offence in its nature: whether one or twenty kill it, it cannot be killed more than once. (c) If partridges are netted by night, two, three or more may draw the net: but still it constitutes but one offence. (d) But this Statute relates to an offence in its nature several, a several offence at common law: and the Statute adds a further sanction against that which each man must commit severally. One may resist, another molest, another run away with the goods, one may break the officer's arm, another put out his eye. All these are distinct acts: and every one's offence is entire and complete in its nature. (e) Therefore each person is liable to a penalty for his own separate offence."

With all respect for the opinion of so eminent a Judge as Lord Mansfield, one may be permitted to make a few observations on this exposition of the law. (a) The Statute 1 and 2 Ph. and M. C. 12, to which reference is made, contemplates a proceeding, *civil* in form,

(1) (1792) 4 T. R. 809.

(2) (1777) 2 Cowper 610.

for recovery of the penalty : consequently, the case decided thereupon, *Partridge v. Naylor* (1) cannot be accepted as a precedent applicable to a criminal proceeding. (b) With reference to the statement that an act of impounding by one, two, three, or four, is one offence, suppose the object impounded was a human being, and numbers were jointly indicted for his false imprisonment : would there, then, be but one act, one offence, or would each be liable to receive his several sentence, the full penalty of the law ? (c) With reference to the observation that killing a hare is but one offence in its nature, for whether one or twenty kill it, it cannot be killed more than once, may it not be asked whether the analogy would apply to the case of killing a man ? If twenty kill a man once and are found guilty of wilful murder, is the statutory sentence to be passed upon one or all ? (d) With reference to the illustration about the netting of partridges, what would happen if two, three or more persons jointly draw away the net and steal it ? Would not all be liable to be convicted and would not each receive the appropriate sentence ? (e) With regard to the concluding observation, the question may be put, whether each would not be guilty of what the joint offender did as if his own hand had performed the act ? I see no escape from the conclusion that the illustrations given by Lord Mansfield are not based on sound principle, and that the true distinction was pointed out by Powell J., when he observed that the criminal proceeding is taken, not with a view to indemnify the person injured but to punish the offender. The cases of *R. v. Hube* (2) and *Barnard v. Gostling* (3) do not develop any fresh point of view, and, consequently, do not require detailed consideration. But reference may be made to the observation of Ashurst J., in the former case to the effect that if the Court were to hold that where one person had disturbed a congregation, he would be liable to pay a penalty of twenty pounds, but that if the offender had 19 persons to assist him, each would be liable to pay twenty shillings only, the conclusion would be absurd, because the amount of the penalty would be diminished with the increase in the gravity of the offence. The later decisions in *Morgan v. Brown* (4), *R. v. Dean* (5), *R. v. Cridland* (6), *R. v. Hartley* (7), *Mayhew v. Wardley* (8) and *R. v. Littlechild* (9), all furnish instances

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(1) (1596) Noy 52 ; Cro Eliz. 480.

(2) (1794) 5 T. R. 542.

(3) (1802, 2 East 569.

(4) (1836) 4 A. and E. 515.

(5) (1843) 12 M. and W. 39.

(6) (1857) 7 E. and B 853 ; 110 R. R. 860.

(7) (1862) 31 L. J. M. C. 232.

(8) (1863) 14 C. B. N. S. 550.

(9) (1871) L. R. 6 Q. B. 293.



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where, upon joint trial, separate sentences were passed upon the offenders who had jointly committed the offences. In one of these cases, *R. v. Dean* (1), Baron Alderson observed that he must look at the statute to see whether it was intended that every person offending should be punished or merely that every offence should be punished. This is open to the obvious criticism that when an offence is said to be punished, it is the offender who is visited with the punishment. The truth is that when an offence has been jointly committed, each offender is *prima facie* liable to be punished irrespective of the guilt of the others who may have participated with him in the commission of the crime. To take a case out of the operation of this, the primary rule, the legislative intent must be made manifest beyond doubt that all the offenders must be jointly subjected to a single penalty. The Court should not lightly depart from the principle that since one who participates with others in a crime is guilty as though he had performed the criminal act unaided, on a joint conviction of all the offenders or on a conviction of some after the others have had their punishment, each should receive a several sentence, the same in extent and intensity as if he had done the whole alone and had been alone convicted. The principle is otherwise in a civil suit for damages, where the full penalty for the damage suffered can be exacted only once.

As regards cases decided in the Courts of this country, stress has been laid principally upon the decision of a Full Bench of the Bombay High Court in *R. v. Showder Ghenar* (2), which overruled the earlier decision in *R. v. Vakhatchand* (3) and restored the authority of the decision in *R. v. Rajgur* (4). The decision of the Full Bench is to the effect that where several persons knowingly harbour, keep or conceal a parcel of smuggled opium, under section 4 of Bombay Regulation, XXI of 1827, only one penalty of double the value of such opium and of double the amount of duty leviable upon it, is recoverable. This view was followed by this Court in a case under section 17 of the Bengal Salt Act (Act VII of 1864 B.C.): *Re Gangadhar Sadhu* (5). It is not necessary for our present purpose to determine whether, upon the terms of the Regulation in question, the interpretation adopted by the Full Bench can be justified. It cannot be denied, however, that the question of construction was one of great doubt, as is amply indicated by the fact that the Full Bench of five Judges overruled a decision, which, though pronounced by three Judges, had the concurrence of three other Judges who had been consulted by them. Sir Michael Westropp, who had been a

(1) (1843) 12 M. &amp; W. 39.

(2) (1870) 7 Bom. H. C. R. Cr. 39.

(3) (1863) 1 Bom. H. C. R. 50.

(4) (1854) 3 Morris 673.

(5) (1874) 22 W. R. Cr. 9.

party to the earlier decision and recorded an elaborate opinion in support of his altered view, was guided principally by the decisions, in England, and, also relied upon the judgment of the Court of Queen's Bench in Ireland in *R. v. McNaghten* (1). The cases in England, as we have seen, no doubt recognise a distinction between several penalty and joint penalty for offences jointly committed, and rest this differentiation upon the phraseology of particular statutes and the quality of the offence in each case. In the large majority of cases, however, the conclusion was actually reached that the offence was several in its nature, and each offender was liable to have a separate penalty inflicted on him. We further find that the earliest case traceable, where a joint penalty was imposed, was in form a civil proceeding, and that although the distinction between a civil and a criminal proceeding was emphasised as early as 1712, it was overlooked or ignored in subsequent cases, which treated the matter, not as one of principle, but rather as one of form dependent upon minute distinctions in the language used in the statutes. Indeed, a review of the cases in the English Courts almost creates the impression that the distinction maintained therein between joint and several penalty owed its origin to a desire to mitigate the severity of the game laws or the revenue laws. As regards the Irish case mentioned by Westropp, C.J., it does not directly elucidate the point in controversy and merely shows that when a person has been adjudged guilty on a charge that he did knowingly harbour and conceal and also did knowingly permit and suffer to be harboured and concealed certain 'contraband' articles, it could not be maintained that the information charged two offences and that there was duplicity in the conviction. I do not feel pressed by the decision of the Full Bench of the Bombay High Court and I am not prepared to extend its application to other cases. As Lord Mansfield said in *R. v. Clark* (2), there is no cause of greater ambiguity than arguing from cases without distinguishing accurately the grounds upon which they were determined; and Couch, C.J., endorsed the same view when he rested his decision in *R. v. Showdar* (3) on the language of the Regulation.

The question under consideration has been repeatedly examined in the Courts of the United States, and the view is well settled there that, as a general rule, crimes are several and that when two or more persons are convicted of the same offence in a criminal prosecution (as distinguished from a penal or *quidam* action which is civil) the

(1) (1845) 9 Ir. L. R. 93.

(2) (1777) 2 Cowper 610.

(3) (1870) 7 Bom. H. C. R. (Cl. 2as.) 39.

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sentence against them must be several; each is subject to the full penalty and punishment provided for the criminal act, in the same manner as if he had been the sole offender. Reference may here be made to some of the leading decisions on the point. In *U. S. v. Ismenard* (1), wherein the defendants were jointly indicted and convicted for keeping a gaming house, it was held that the fine imposed must be several. In *Turner v. U. S.* (2), wherein the defendants were jointly indicted and convicted of cutting timber on Government land, the Court said:—"The defendants were indicted, tried jointly, and both were convicted, and the Jury found the damages committed by them to be \$248.80. Section 2461 of the Revised Statutes provides that 'every such person (meaning every person who has violated the section) shall pay a fine of not less than triple the value of the trees and timber so cut, destroyed or removed, and shall be imprisoned not exceeding twelve months.' The fine provided is a part of the punishment as much as is the imprisonment; it is necessarily assessed against each, just the same as the imprisonment. Any reasoning which would make the money-penalty joint would necessarily make the imprisonment joint." In *McLeod v. State* (3), it was held that where two persons were jointly indicted, tried and convicted for living in adultery, and their common surety confessed judgment, on the conviction a separate judgment should be rendered against each with his surety, for the amount of the fine and costs. In *Curtis v. Hurlburt* (4), the Court said:—"All offences at the Common Law are several, that is, though several join in the commission of the act, and that act is single, yet each is guilty severally, and is liable to a separate punishment. If two should jointly take, and with a felonious intent carry away, the goods of another, each would be guilty of the crime of theft, and might be prosecuted jointly or separately. When a statute creates an offence, it may be joint or several, according to the language made use of. The statute on which the present question arises is, that 'no person shall use any bush seine in Ousatonnick river, etc., on penalty of sixty-seven dollars for every such offence'. The question is, whether this is a several offence in each person concerned in it, or only one offence in them all, so that one penalty only can be inflicted. No words can be more appropriate than the words of this statute to designate a several offence—no person shall do the act, under a certain penalty, for each offence. It is the same as the words, every person who does the act—whoever

(1) (1803) 1 Cranch C. C. 150; 26 Fed. Cas. No. 15450.

(2) (1895) 66 Fed. 280, 30 U. S. App. 50; 13 C. C. A. 436.

(3) (1860) 35 Ala. 395.

(4) (1817) 2 Conn. 309.

does the act—if any person shall do the act, such person shall suffer a certain penalty. As by the Common Law, when several join in the commission of a crime, each is considered as severally doing the act, so here, though several may join in the act, yet every person is considered as severally committing the crime and incurs a several penalty.” In *State v. Hunter* (1), it was said: “The record does not present us with a copy of the indictment, but it is stated in argument that the defendants were jointly indicted under the statute for the suppression of intemperance. Section 4789 of the Revision provides, that in all misdemeanours, defendants jointly indicted may be tried separately or jointly in the discretion of the Court; but there is no statutory provision, to which our attention has been called, authorizing a joint judgment. Indeed, in the very nature of the case, the judgments would necessarily be separate against each person convicted. The person committing an offence against the State must himself be amenable to the law; another person cannot be substituted for him or be made to suffer for his violation, and although two or more persons may together commit an offence, each is punishable for his own crime and not for that of the other. The infliction of the penalty upon one of two jointly tried and convicted will not satisfy the judgment in respect to the other, as will a satisfaction by one of two joint judgment-debtors in a civil action operate as a full satisfaction of the judgment as to both.” In *Caldwell v. Commonwealth* (2), the Court said: “In prosecution on behalf of the Commonwealth, each individual is responsible for his own individual act, and must answer to the Commonwealth, personally, for his own personal offence. If both are guilty, each is guilty, and each must make his fine to the Commonwealth for the penalty fixed by law to the offence of which he has been found guilty. Though in criminal and penal cases, the prosecution may be joint, the judgment should be several, as the judgment addressed itself to each individual offender, as the punishment of his delictum.” In *Bosley v. Commonwealth* (3) it was said: “We think the verdict and judgment erroneous. Although the law allows a joint indictment and trial, still a joint judgment is erroneous, because thereby one of the defendants may be compelled to pay the whole amount, and in that event he would not be entitled to contribution from his co-defendants. Thus, the other defendants would escape punishment entirely, and the whole burden might fall upon him who was least blameable in the transaction. So far it would savor of punishing one man for the guilt of another.” In *Jones v.*

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(1) (1871) 33 Iowa 361.

(2) (1838) 7 Dana (Ky) 229.

(3) (1832) 7 J. J. Marsh (Ky.) 598.

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*Commonwealth* (1) wherein several persons were indicted for an assault, and it was held error to impose a joint fine against them, Roane J., said : "In this country, I consider the construction as fortified not only by the principles of natural justice, which forbid that one man should be punished for the fault of another, but also by the clause of the Bill of Rights prohibiting excessive fines, and the Act of October 1786 (c. 65, 12 St. L. 355) founded on the spirit of it, and providing that the fine should be according to the degree of the fault and the estate of the offender. But it is most unreasonable, and directly in the teeth of the Act, that one man should suffer the punishment imposed by the Jury upon all who may chance to be with him ; and who were all in the contemplation of the Jury, who assessed the fine. This is so unjust and contrary to the spirit of the Bill of Rights, that even if it were established by adjudged cases to be the law, nay even if an Act of Assembly should pass authorizing it, in express terms, I should most probably be of opinion that the one should be exploded and the other declared unconstitutional and not law." In *Waltser v. State* (2), the Court said : "It is unnecessary to notice all the errors assigned in this case, as the form of the judgment is fatal. This was a criminal prosecution, and even admitting that all of the defendants could be and were properly tried jointly, the punishment should have been several. Each should have been sentenced to pay a fine, according to the nature and aggravation of his offence. Every individual is answerable for his conduct to the State. The guilt of one is neither mitigated nor enhanced from the fact that another may be also guilty." In *Reg. v. Grannis* (3), wherein it was contended that where two persons, in that case a partnership, were convicted of selling intoxicating liquors, the fine imposed upon them should be several and not joint, the Court, though the case was reversed on another ground, said : "in 2 Hawkins. P. C. c. 48, section 18 it is laid down, that where there are several defendants, a joint award of one fine against them all is erroneous, for it ought to be several against each defendant ; for, otherwise, one who had paid his proportionable part might be confined in prison till all the others have also paid theirs, which would be in effect to punish him for the offence of another. In Burn's Justice (30th ed.) Volume I, p. 1154, where this passage from Hawkins is referred to, it is said : "If several defendants are convicted, whether the offence is in its nature single or joint, a joint award of one penalty against them is bad." There is a statement to the same effect in Paley on Convictions page 278.

(1) (1799) 1 Call (Va) 555.

(2) (1854) 3 Wis. 785.

(3) (1888) 5 Manitoba 153.

And in *Morgan v. Brown* (1), Littledale J., said at page 519, "The general result of the authorities cited in Hawkins, I think, is that, where a fine is imposed upon several defendants, it should be imposed upon them separately." There are, on the other hand, isolated cases where joint penalties have been imposed: *Lemons v. State* (2); *Barada v. State* (3); explained in *State v. Berry* (4); *Wiggins v. Henderson* (5). The rule deducible from the cases in the American Courts may consequently be best stated in the words of Caldwell J., in *Thompson v. State* (6): "though joint actors in the commission of the same offence are jointly tried and convicted, it is proper that punishment be inflicted upon the defendants separately as if each had committed the offence alone, each is bound to respond in full to his own separate sentence; satisfaction, in whole or in part, of that against one of them not satisfying that against the other one, in any sense or to any extent," *People v. Kent* (7); *State v. White* (8); *U. S. v. Babsow* (9); *Calico v. State* (10); *Struughan v. State* (11); *State v. Hopkyns* (12); *Gathings v. State* (13); *State v. Gay* (14), *Mar. h v. People* (15); *State v. Smith* (16).

What, then, is the 'true position, if we seek to interpret bye-law 85, read with section 561 of the Calcutta Municipal Act. The section authorises the General Committee to prescribe by a bye-law that a breach thereof shall be punishable with fine which may extend to twenty rupees. Bye-law 85 provides that every person guilty of a breach of bye-law 83 shall be punishable with fine which may extend to twenty rupees. *Prima facie*, every person guilty of such breach is punishable, regardless of the circumstance that there may be other persons who may have participated in the commission of the offence and may be equally punishable. I do not lay stress on the use of the expression "every person" in bye-law 85; the inference I would draw would be precisely the same, even if the bye-law had been so framed as to read that of "breaches any of these bye-laws shall be punishable." I do not base my conclusion on the form of the

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(1) (1836) 4 Ad. and El. 515; 31 E. C. L. 119.

(2) (1874) 50 Ala. 130.

(3) (1850) 13 Mo. 94.

(4) (1855) 21 Mo. 504.

(5) (1894) 22 Nev. 103; 36 Pac. 459.

(6) (1900) 105 Tenn 177; 51 L. R. A. 883; 80 Am. St. Rep. 875.

(7) (1908) 151 Mich. 134; 14 Ann. Cas. 208.

(8) (1911) 125 Tenn. 143; 140 S. W. 1059.

(9) (1838) 1 Ware 462; 24 Fed. Cas. 14489.

(10) (1842) 4 Ark. 430.

(11) (1855) 16 Ark. 37.

(12) (1845) 7 Blackf. (Ind). 494.

(13) (1870) 44 Miss. 343.

(14) (1847) 10 Mo. 440.

(15) (1849) 7 Barb. N. Y. 391.

(16) (1817) 1 Nott. &amp; M. (S.C) 13.

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expression, but on the substance of the matter. We have to construe a provision which operates as a statutory rule for the punishment of an offence. Unless intention to the contrary is established beyond the possibility of all doubt, the Court should interpret the provision in the light of the principle that all who participate in the commission of a crime are severally responsible, as though the offence had been committed by each of them acting alone. In the case before us, there is nothing to indicate that the framers of the bye-law acted on the principle that the larger the number of persons who participate in its violation, the smaller the responsibility and liability to punishment of each offender. I see no escape from the conclusion that the decision of the majority in *Amritalal Bose and others v. Corporation of Calcutta* (1) cannot be defended on principle. I am fortified in this view by the nature of the order made in that case. The Magistrate had imposed a fine of twenty rupees upon one of the accused persons, and a fine of ten rupees upon each of the others. This Court imposed a fine of twenty rupees to be apportioned equally amongst them. If, as was held, the quality of the offence made the liability joint, how could a distinct penalty be imposed upon each? Mr. Norton was constrained to concede that a sentence in this form could not be supported; on the other hand, if a joint sentence was passed and the Crown proceeded to levy the fine from one of the offenders, the others would in substance escape all punishment. No explanation was offered in justification of such a result. Furthermore, it is conceivable that, in a case of this character, the several offenders might not be guilty to the same extent and some discrimination should be exercised in imposing the sentence, as the Magistrate actually did. No explanation was even suggested as to how this can be achieved, if a joint penalty has to be inflicted or if the penalty imposed has to be equally apportioned.

My conclusions may be summarised as follows:—

(1) As a general principle of criminal law, all who participate in the commission of an offence are severally responsible, as though the offence had been committed by each of them acting alone, consequently, although as joint actors in the commission of the crime they may be jointly tried and convicted, each must be separately punished, as if he had committed the offence alone. (2) This general principle is applicable in the construction of bye-law 85 read with bye-law 83 and section 562 of the Calcutta Municipal Act; consequently, each person who has committed a breach of the bye-law in question is, upon conviction, liable to be punished with the maximum amount

(1) (1917) 26 C. L. J. 29.

of the prescribed fine, regardless of the number of persons who may have been associated with him in the commission of the breach. (3)

The case of *Amritalal Bose and others v. Corporation of Calcutta* (1) was not correctly decided, and (4) the convictions and sentences in the six cases before us must be upheld and the rules discharged.

**Fletcher, J.**—I agree in the judgment delivered by the learned Chief Justice.

**Richardson, J.**—I agree. The question whether the petitioners are liable to a single punishment or to several punishment for each offence committed is mainly a question of construction.

The answer depends in the first instance on the bye-laws under which the petitioners were convicted and sentenced.

The validity of bye-law 83 is not questioned, but it is argued that bye-law 85 is repugnant to the principal Act, and *ultra vires*. The repugnancy suggested is that while section 561 of the Act enables "a breach" of a bye-law to be punished, bye-law 85 says that "every person guilty of a breach" shall be punishable. It is argued that if the bye-law means that every person participating in a breach is separately amenable to the punishment provided it goes further than section 561 warrants. This contention is in my judgment untenable.

In the nature of things when a punishment is provided for an offence the punishment must obviously fall on an offender. What is meant by "punishing an offence" is punishing an offender for that offence. The expression may be elliptical, but it is perfectly natural and quite in accordance with general usage and the usage of the legislature in other Acts. In section 40 of the Penal Code an "offence" is spoken of as "a thing made punishable." In clause (o) of section 4 of the Criminal Procedure Code the definition of "offence" is "any act or omission made punishable by any law for the time being in force." This definition is repeated in section 3 (37) of the General Clauses Act, 1897, and in section 3 (30) of the Bengal General Clauses Act, 1899. Section 195 of the Criminal Procedure Code speaks of "any offence punishable" under certain specified sections of the Penal Code. In section 64 of the Penal Code the 'punishable offence' and the offender are brought into juxtaposition:—"In every case of an offence punishable with imprisonment as well as fine, in which the offender is sentenced to a fine . . . .".

According then to the ordinary meaning of the words which occur in section 561 they refer to and contemplate the punishment of offenders. Within the limits expressly prescribed the General Committee are empowered to make provisions for the punishment

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of those who commit breaches of their bye-laws. The words of the section are, in my opinion, wide enough to authorize provision being made for the punishment of joint offenders or persons who join in committing a breach of any bye-law not only in the manner described as single, but also in the manner described as several. If, therefore, bye-law 85 permits several punishments, the contention that it is for that reason inconsistent with section 561 and therefore invalid falls to the ground.

Then what is the true meaning of bye-law 85? In my opinion, the bye-law read by itself is clearly capable of being construed so as to authorize several punishment. More than that, both by their own force and upon the analogy of the penalty sections of the Penal Code, such a construction is the obvious and natural construction of the words used. The bye-laws, it must be borne in mind, cannot be read as providing for either mode of punishment in the alternative. Whichever mode is provided, the other is excluded. There are no alternative words and where the law imposes a several penalty, a joint penalty is illegal and *vice versa*. *Prima facie*, the bye-law clearly imposes several punishment.

This conclusion is supported by certain provisions of a general character included in the codified criminal law of this country. It is not disputed that offences under the Penal Code are severally punishable. Under section 40 of the Code, the word 'offence' primarily denotes "a thing made punishable under this Code," but in certain specific sections of the Code it denotes "a thing made punishable under this Code or under any special or local law," a "special law" being by definition a law applicable to a particular subject, and a "local law," a law applicable only to a particular part of British India. Among the sections in which the word has the extended meaning are sections 64 to 67 relating to imprisonment in default of payment of fine, section 71 relating to the punishment of offences made up of several parts, and sections 109, 110, 112, 114, 115, 116 and 117 which occur in the chapter relating to abetment. The result is to assimilate in these and other respects offences punishable under a special or local law to offences punishable under the Penal Code, and I note in passing that in the case which has been so much referred to, *R. v. Clark* (1), Aston J., gave the liability to punishment for abetment as a reason for considering that the offence in that case was a 'several' offence.

I conceive that an offence created by, and punishable under, bye-laws is an offence under the special or local law under which the

(1) (1777) 2 Cowper 610.

bye-laws were framed. But if there be any doubt as to the applicability of section 40 of the Penal Code to offences under bye-laws, no such doubt attaches to the provision, also a general provision, contained in section 26 of the Bengal General Clauses Act, 1899, to the following effect :—"Sections 63 to 70 of the Indian Penal Code and the provisions of the Code of Criminal Procedure for the time being in force in relation to the issue and the execution of warrants for the levy of fines, shall apply to all fines imposed under any Bengal Act or any rule or bye-law made under any Bengal Act, unless the Act, rule or bye-law contains an express provision to the contrary." This enactment makes no mention of the sections of the Penal Code relating to abetment, but it is not necessary to press the argument founded on those sections and for all practical purposes that argument may be disregarded. It is sufficient in the present case to advert to the provisions relating to imprisonment in default of payment of fine. It may be that the proviso at the end of section 26 leaves room for the imposition of a single fine or a single punishment in any case in which the Legislature may choose by apt words to impose such a penalty and that accordingly the notion of 'single offence,' whatever the expression may mean, is not excluded. But clearly in the generality of cases in all those cases such as the present where the provisions of the Penal Code referred to are not made inapplicable, the mode of punishment contemplated is several punishment. Under section 64 of the Penal Code "in every case in which.....an offence is punishable with fine only, in which the offender is sentenced to fine, it shall be competent to the Court which sentences such offender to direct by the sentence that in default of payment of the fine the offender shall suffer imprisonment for a certain term." In such cases the term of imprisonment which may be imposed in default is regulated by section 67. Now if it be supposed that the punishment to which the petitioners are liable under bye-law 85 is a single punishment, only a single fine can be imposed. The fine cannot be apportioned among the petitioners, because as soon as it is apportioned, the punishment becomes several. That being so, how is imprisonment in default of payment to be imposed? The imprisonment, as the Advocate-General pointed out, cannot be apportioned any more than the fine.

Some attempt was made to argue that the petitioners as constituting a partnership were one person within the definition in section 3 (32) of the Bengal General Clauses Act. But that definition only applies "unless there is anything repugnant in the subject or context" and for the present purpose it is quite impossible to regard them as one person. They might perhaps criminally be jointly liable to a

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fine, just as civilly they might be jointly liable under a decree for damages, but they are not liable to fine as one person and they cannot be imprisoned as one person. Mr. Norton admitted that if one of the partners took no part in continuing a performance after 1 A.M. he would not be liable at all. The petitioners are clearly liable not as a partnership but as three individuals though as three individuals they might conceivably be jointly liable.

In my opinion these provisions of the Penal Code made applicable by section 26 of the Bengal General Clauses Act strongly support the view that the punishment admissible under bye-law 85 is several and not single.

Lastly, it is said that there is something in the nature of the offence created by bye-law 83 such that bye-Law 85 must be read, if this is at all possible, as imposing only a single punishment. The offence, it is said, is by its nature a "single" offence. The argument was based by Mr. Norton on the decision of a Full Bench of the Bombay High Court in *R. v. Showdar Ghenar* (1) where nearly all the English cases are cited by Westropp, C.J. It would be tedious to go through these cases again. The main stay of the whole contention is to be found in the observations of Lord Mansfield in *R. v. Clark* (2) which have already been read.

The difficulty, I have, is in understanding the conception of a "single offence" which is involved in those observations, nor was much light thrown upon the point at the Bar. The Advocate-General (for the Municipality) felt himself pressed by the weight of Lord Mansfield's authority and it is impossible not to share that feeling. Speaking with diffidence, I confess that I cannot in my own mind see how any offence which 'several persons may join in committing' can by its nature be repugnant or antagonistic to the notion of several punishment. The illustrations given do not help me. As the learned Chief Justice observed in the course of the argument, a man, like a hare, has only one life, yet several persons may be severally hanged or transported for life for the same murder. I have tried to think of an explanation, but the only explanation I can suggest is that a term which may be appropriate to the punishment provided in particular cases is sometimes ascribed to the offence. In such cases what is really single is the punishment and not the offence. I have not examined the cases to see whether this suggestion is well-founded. Nor would such an inquiry serve any useful purpose. For, if the

(1) (1870) 7 Bom. H. C. R. (Cr. Cas.) 39.

(2) (1777) 2 Cowp. 610.

suggestion accounts for the original employment of the term 'single offence,' the term might afterwards come to be employed in cases where it could not be so easily justified. Another suggestion which may be hazarded as regards the earlier English cases, especially cases under the game laws, is that they were decided according to what the Judges conceived to be "the equity of the statute," a mode of construction which has gone out of favour and fashion in consequence of the more precise legislation of modern times.

The term 'single' has other uses : it sometimes denotes one complete offence as distinguished from other and separate offences of the same kind. In this sense the theft of a book is a single offence. There is not a separate theft of each leaf. So by 'exercising his ordinary calling on a Sunday' a man only commits one offence [*Crepps v. Durdan* (1), per Lord Mansfield]. Curiously enough in that case the hare was again referred to in illustration, "killing a single hare is an offence but the killing ten more on the same day will not multiply the offence or the penalty imposed by the statute for killing one."

The term again may perhaps be applied to offences, such as perjury, which an offender can only commit alone.

But neither of these uses of the word affords any clue for the determination of offences which several persons may join in committing but which nevertheless are so single in their nature as to demand only a single punishment. I do not know by what test such 'single' offences are to be distinguished from 'several' offences. I confess, therefore, that I can find nothing in the Bombay case or in the English cases there cited which really throws any light on the question how this bye-law 85 made under the Calcutta Municipality Act is to be construed. The offence of continuing a performance later than 1 A. M. seems in a sense single enough, but is it more single than stealing a book? If, however, the distinction between single and several offences as explained in *R. v. Clark* (2) is to be applied, an offence according to that case appears to be 'several' if it is the product of different persons doing different things, and I can easily conceive that the offence in the present case, the continuance of a performance after 1 A.M., was on each occasion on which it was committed the result of different acts done by each of the three petitioners.

From whatever point of view the question before us be approached the considerations which arise point to the conclusion that the words of bye-law 85 must be taken in their ordinary meaning. "Every

(1) (1777) 2 Cowper 640.

(2) (1777) 2 Cowper 610.

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person guilty of a breach.....shall be punishable....." means that every person convicted of a breach shall be liable to the penalty. This conclusion is consistent with the most recent of the English cases cited before us which is also apparently the last reported case in England on the point, *R. v. Littlechild* (3). There without going into the question whether the offence committed was in its nature single or several, separate penalties were upheld, because a penalty was imposed by the Act upon each person convicted. So in the passage from Paley on Summary Convictions (6th Edition, page 276) which was quoted by Hannen J., "If either the penalty be imposed by the Act on each person convicted, even where the offence would in its own nature be single or if the quality of the offence be such that the guilt of one person may be distinct from that of the other—in either of these cases the penalties are several." Paley's summary of the result of the English cases supports the suggestion above ventured that a 'single offence' in this connection means an offence for which a single punishment is expressly provided by law.

For the reasons indicated, I agree that the question put to the Full Bench should be answered in the negative.

M. N. M. ; D. K. R.

*Rule discharged.*

(3) (1871) L. R. 6 Q. B. 293.

## APPELLATE CIVIL.

*Before Mr. Justice Fletcher and Mr. Justice Newbould.*

KUMUD KRISHNA MANDAL AND OTHERS

v.

JOGENDRA NATH SIRCAR.\*

*Indian Succession Act (X of 1865), Secs. 82, 111—Hindu Wills Act (XXXI of 1870)—Will, construction of—Bequest to a legatee on attaining majority—Absolute interest, if passes to the legatee—Contingent bequest—Period of distribution—Legacy, when can take effect—Sale in execution of a money decree—Right, title and interest of the judgment-debtor, purchase of—Reversionary interest, if passes by the sale—'Santam,' meaning of.*

A testator died leaving a minor daughter. By his will he appointed his brother executor to the estate left by him. The executor was directed to keep accounts of the income and expenditure of the movable and immovable properties left by the testator; and the will further provided that "on my said daughter attaining her majority, he (the executor) will give her my estate and make over the accounts. If he should fail in that, he will be responsible in

\* Appeal from Original Decree No. 498 of 1913, against the decision of Babu Asutosh Ghose, Subordinate Judge, 1st Court, 24-Pargannas, dated the 27th August 1913.

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accordance with law. God forbid it, if my daughter should die childless, then my full brother will get the properties in my share."

*Held*, upon a construction of the will, that an absolute estate in the properties left by the testator passed to the testator's daughter on her attaining majority, and on the death of the said daughter without any issue, after attaining majority, no interest passed to the brother of the testator, inasmuch as under section 111 of the Indian Succession Act the gift in his favour could only take place before the estate was distributable, that is before the daughter received the estate by transfer from the executor under the provisions of the will.

The expression "right, title and interest of a judgment-debtor" in a property sold in execution of a decree ordinarily includes the reversionary interest, if any, of the judgment-debtor in the property sold.

The Bengali word "*Santan*" means issue generally, and is not limited to a male descendant.

*Bhoobun Mohini Debys v. Hurrik Chunder Chowdhry* (1) referred to. *Buddha Singh v. Lalit Singh* (2) distinguished.

Appeal by the Defendants.

Suit for partition on declaration of title.

Plaintiff's case was that one Lakshi Narayan Sircar was the owner of the disputed property, and he died leaving three sons Upendra, Jogendra (the plaintiff) and Lalit, each of whom became thus entitled to a third share of it. Upendra then died leaving a widow Kumudini and a daughter Sarmistha after executing a will, the material provisions of which are as follows :—

"According to Sastras, in those properties, I have an one-third share; I am in possession and enjoyment of the same. The rest belongs to my full brother Jogendra Nath Sircar, and step brother Lolit Mohan Sircar, minor. \* \* \* \*

"I appoint my obedient and full brother Jogendra Nath Sircar as executor to act in accordance with the terms of this will. He will be capable of doing all acts, in accordance with the terms written in the will, to which none will be able to object, even if any one does, it will not be allowed.

"I have no son; I have only one wife Kumudini Dasi, and one daughter Sarmistha Dasi; of them my wife has not at all any love and regard for me, and she is not under my control. \* \* \*

"The Executor will keep accounts of the income and expenditure of my movable and immovable properties; and on my said daughter attaining her majority, he will give her my estate and make over the accounts. If he should fail in that, he will be responsible in accordance with law. God forbid it, if my daughter should die childless, then my full brother Jogendra Nath Sircar will get the properties in my share. If the said Executor be not alive at that

(1) (1878) L. R. 5 I. A. 138.

(2) (1915) 22 C. L. J. 481.

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time then Jitendra Nath Sircar, son of the said Jogendra Nath Sircar, will get the properties etc. in my share. \* \* \*

"The Executor will purchase Government papers by keeping in deposit the surplus that will be left after defraying from the income of my estate all the expenses in accordance with the above provisions, and if he gets any property yielding profits higher than the interest of those papers he will purchase the same. The said property will be used as if acquired by me exclusively and its income will be added to that of my estate; and he will carry out all the provisions of this will from the said income and he will make over those properties, together with the other properties described in the will, to my daughter on her attaining majority. \* \* \*"

Sarmishtha died, after attaining majority, without leaving any issue. Plaintiff Jogendra thus became owner of this one-third share by virtue of his brother's will. Plaintiff further alleged that before the probate of the will was taken one Kenaram Haldar had obtained a decree against him alone, and the father of the defendants purchased his right, title and interest in the disputed property in the auction-sale held in execution of it, but managed to get the name of the said Lalit Mohan Sircar inserted in the sale-certificate and that as Upendra's heir or executor was not a party to the decree, so his interest did not pass by the sale, and the plaintiff remained owner of it by virtue of Upendra's will. Hence this suit for establishment of plaintiff's title to one-third share of the property, and for partition of the same by metes and bounds.

Defendants contended *inter alia* that plaintiff did not acquire any title to the land in suit by his brother's will, that the entire property was sold in execution of the decree, and, that they were in peaceful possession thereof for more than 12 years and thus also acquired title by adverse possession.

The Court of first instance over-ruled the objections of the defendants, and passed a decree in favor of the plaintiff.

Against that decision the defendants appealed to the High Court.

*Sir Rash Behary Ghosh, Babus Ram Churn Mitra and Jatindra Nath Lahiri* for the Appellants.

*Babu Bepin Behary Ghose (II) and Babu Jyotish Chandra Hazra* for the Respondents.

The following judgments were delivered :

**Fletcher, J.**—This is an appeal by the defendants from a judgment of the learned Subordinate Judge of the first Court of the Twenty-four Perganahs. The case comes back to this Court after

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remand. The learned Judge in the lower Court decreed the plaintiff's suit. The plaintiff brought the suit to establish his title to one-third of a particular piece of land the whole of which was purchased in the year 1886 by the ancestor of the defendants in execution of a money decree in which, at any rate, according to the plaintiff's own case, he himself was one; if not, the sole judgment-debtor. The plaintiff had one brother and a step-brother. The brother's name was Upendra Nath Sirkar. Upendra made a will and died on the 19th June 1882. He left him surviving his widow Kumudini with whom, it is quite clear from the terms of his will, he was not on good terms and an only child, a daughter Sarmistha Dasi. The case set up by the plaintiff is this : That the property in suit formed a portion of his ancestral estate of which he, his brother Upendra and his half-brother Lalit Mohan were each entitled to one-third. The defendants purchased, as I have already said, in execution of a money decree. That money decree is not forthcoming. But, according to the plaintiff's own case, he was liable for the whole amount recoverable under that decree. In execution of that decree, the property was put up to sale on the 6th April 1886 and purchased by the defendant's ancestor. The case put forward by the plaintiff and which has been assented to by the learned Judge of the Court below seems to me to be an extraordinary case. The plaintiff says that he took under the will of his brother Upendra in the events that had happened which I shall refer to presently a reversionary interest which became absolute on the death of the only child of Upendra, namely, Sarmistha without any issue. The property that was sold in execution was the whole of the piece of land and the case set up by the plaintiff Jogendra is that, although he admits that the original share that he inherited from his father passed under the sale in execution, the one-third share that he acquired under the will of his brother in the event of the death of the only child of Upendra without issue did not pass. Of course, that is a very strong case to set up because the Court sold the property to the predecessor of the defendants and ordinarily any right title and interest which the judgment-debtor had in possession, in reversion, in remainder or in expectancy would pass to the purchaser. That the Court meant to limit in any sense the operation of the conveyance cannot, I think for one moment, be suggested. But apart from that, I think in this case it is extremely doubtful whether the contention put forward by the plaintiff is right. The words on which the plaintiff says that he acquired the interest under the will of his brother Upendra are these: Under clause (7) of the will of Upendra, the executor was

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in the first instance, directed to keep accounts of the income and expenditure of the movable and immovable properties left by the testator and then the will proceeded as follows: "and on my said daughter attaining her majority he," that is, the executor Jogendra "will give her my estate and make over the accounts. If he should fail in that, he will be responsible in accordance with law. God forbid it, if my daughter should die childless, then my full brother Jogendra Nath Sirkar will get the properties in my share." The daughter Sarmistha survived her father, attained majority but died without issue. It is argued, therefore, that the property passed to the brother, the plaintiff Jogendra. Under the Hindu Wills Act in which are incorporated some of the provisions of the Indian Succession Act, I do not think that that is so. The first section that is referred to is section 82 of the Indian Succession Act which provides that where property is bequeathed to any person, he is entitled to the whole interest of the testator therein, unless it appears from the will that only a restricted interest was intended to be given. Then, under section 111 which is a statutory enactment of one of the rules in the well-known case of *Edwards v. Edwards* (1) it is provided that where a legacy is given if a specified uncertain event shall happen and no time is mentioned in the will for the occurrence of that event, the legacy cannot take effect unless such event happens before the period when the fund bequeathed is payable or distributable. The rule in *Edwards v. Edwards* (1) has received judicial comment not favourably on many occasions; but, in this country, that rule as enacted in section 111 of the Indian Succession Act is a part of the statutory law of the land and it is not open to the Courts here like the Courts in England to reconsider the judgment in the case of *Edwards v. Edwards* (1). We have got to take section 111 as the law in India and in which full effect has got to be given to the ordinary meaning of the words. First of all, there is a dispute between the parties as to the word that has been translated as "childless" in the translation of the will of Upendra in the 7th clause. It is said that in the case of *Buddha Singh v. Laltu Singh* (2) Mr. Amir Ali in delivering the judgment of the Judicial Committee of the Privy Council has laid down that the word *Santan* (সন্তান) which is a Bengali word means not issue or descendants as is given in the books and in Wilson's Glossary but male issue. On the other hand, we have got two decisions of this court in the cases of *Kisto Kishore Bhattacharjee v. Seetamonee Bhattacharjee* (3) and *Hurish*

(1) (1852) 15 Beav. 357.

(2) (1915) 22 C. L. J. 481; 20 C. W. N. 1 (9).

(3) (1867) 7 W. R. 320.

*Chunder Chowdhry v. Chunder Manee Debia* (1) the latter of which was affirmed by the Judicial Committee, *Bhoobun Mohini Debya v. Hurrish Chunder Chowdhury* (2) in which it is held that the word *Santan* means issue generally and is not limited to a male descendant. I do not think that Mr. Amir Ali meant in any way to cast any doubt upon the two decisions I have referred to. What we find in the judgment is that Mr. Amir Ali in expressing the opinion of the Judicial Committee as to the meaning of the word *Santan* as used by the author Vijnaneswara in the Sanskrit book Mitakshara stated that the word *Santan* as used by that particular author in a portion of his work meant a male descendant. He did not purport to lay down what the ordinary meaning of the word *Santan* was as used in the Bengali documents at the end of the 19th or the beginning of the 20th century. There seems to be no doubt that issue generally is the meaning of the word *Santan*. Then, the daughter of Upendra having survived her father and having attained majority, ought to have the property transferred to her as is provided by the 7th clause of the will together with the accounts as kept by the executor. It is said that under section 111 of the Indian Succession Act this gift over in favour of the plaintiff could take effect because under section 111 the period of distribution was not until the death of the daughter Sarmistha. I think it is quite impossible to say that the period of distribution in this case would be the death of Sarmistha unless it can be held that Sarmistha took less than an absolute interest, because if Sarmistha, on the terms of clause (7) of the will, took, as she would have taken if she had been a person governed by the provisions of the Indian Succession Act, an absolute interest, it is impossible to say that the period of distribution under the terms of the will could be postponed later than either, the date of the death of the testator or the date when Sarmistha attained full age whichever event happened later. The case that has been made by the learned vakil for the plaintiff respondent is that there is a presumption that every gift made by a will to a Hindu woman is of a limited interest. There is nothing to support that proposition. In fact, the proposition is the other way. The statement of the rule of Hindu Law is contained in the judgment of a learned Hindu Judge of this Court in *Bhoba Tarini Debya v. Peary Lall Sanyal* (3) and the rule laid down by the learned Judge is this: That the presumption applies only in the case of a gift by a husband to his wife. It will also apply in the case where the gift is a maintenance grant

(1) (1875) 24 W. R. 268. (2) (1878) L. R. 5 I. A. 138; I. L. R., 4 Calc. 23.

(3) (1897) I. L. R. 24 Calc. 646.

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because the very nature of the grant shows that it is not to be a grant of an absolute interest although the words used in the deed would otherwise be sufficient to convey an absolute interest. There will also be a restriction when any words used in the will are sufficient to show that the testator did not intend to give an absolute interest. But apart from the case of a husband to his wife, in all other cases there must be something to show that the interest taken by a Hindu woman is not to be an absolute interest. In the present case, there is absolutely nothing except that the legatee is a woman. First of all, it is said that if it be held to be an absolute interest, the testator's wife with whom obviously he was on bad terms might have been in certain events entitled to the property. On the other hand, that argument that the interest was not an absolute one given to the daughter would exclude the daughter's daughter in favour of the plaintiff. I do not think that that is what was intended by the testator. At any rate, there is nothing to show one way or the other whether the testator had any such intention. We must take the words of the will as they are and see what the testator meant and whether there are any words used in the deed to show that the testator meant to give this daughter Sarmistha less than an absolute interest. I do not think that there is anything which cuts down the clear term of the gift "to my daughter on attaining majority." If that is so, then, under section 111 of the Indian Succession Act, the gift in favour of the brother must take place before the estate is distributable, that is, before the daughter receives the estate by transfer from the executor under clause (7). I think this is a perfectly clear case that the daughter did take an absolute interest liable to be defeated either by death during her father's lifetime or by her own death during minority. But subject to that the interest is an absolute interest.

Then, there is the other head of the case, namely, that the interest of the plaintiff did not pass by the sale in execution. The plaintiff seems to have persuaded the learned Judge of the Court below that he was the only person liable under the decree in execution of which the property was sold in 1886. I think there is grave doubt as to the learned Judge being correct in that. It is said that the decree has disappeared and there is no evidence as to what the decree stated. But we have got the terms of the decree stated in the judgment of the case in which the testator's daughter Sarmistha was the plaintiff and there it is stated that all the three brothers were jointly liable under the decree. We have also got the statement of the present plaintiff in the application by which he applied to the Court

for leave to sell a portion of the estate of Upendra for the purpose paying off the debts. The present plaintiff states that that application was made to the learned District Judge to authorize him (Jogendra) to sell a portion of his own property for the payment of his own debts. That is an idle explanation. There cannot be any doubt as to what the application was, namely, that it was an application under section 90 of the Probate and Administration Act for the purpose of enabling Jogendra as the executor of his brother Upendra's will to sell a portion of Upendra's estate for the purpose of satisfying the decree that had been passed against Jogendra and his brothers. I must confess that I am at a loss to understand how the learned Judge, on the evidence before him, could have come to the conclusion that it had not been established that Upendra's portion of the property was liable under the decree. But, in my opinion, it makes little difference because obviously Jogendra was liable on his own statement for the whole of the decretal amount. His statement was that the suit was brought on a promissory note and that he alone was sued and judgment was passed for the whole amount against him. It is said that the sale could not affect Upendra's share in the property because although Upendra's Will had been proved prior to the sale in execution of that decree, the probate had not issued out of the Court of the learned District Judge. I am not prepared to pay much attention to that contention. Even if it has any force, there is nothing in it at all. Jogendra according to his own statement, was the person solely liable under the decree. He had an interest inherited from his father. According to his own case, he had a reversionary interest expectant on the death of his niece Sarmistha to one-third of the property under the will of his brother Upendra. That interest could be sold, dealt with, taken in execution, without the will of Upendra being proved. As a matter of fact, the will had been proved, although probate had not issued to the plaintiff because apparently there was some dispute probably as regards the stamp duty payable on the grant which had not been settled in the Court of the learned District Judge. But the Court having sold all the right, title and interest of Jogendra in the whole of this property to the defendants' ancestor, Jogendra cannot now say that that sale did not pass any interest which he says was on the date of the sale in reversion but which on the death of Sarmistha without issue would fall into possession. It is a case which I am clearly of opinion he cannot put forward. The case seems to me to be a perfectly simple one. In my opinion, first of all, Jogendra took no interest in the events that had happened in the one-third of the property under the

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will of his brother Upendra. If he did, it was a reversionary interest—an interest then in reversion but now in possession—which was sold under the sale in execution in 1886 and that interest passed by the sale in execution to the ancestor of the present defendants. In either view, the present suit cannot succeed. I, therefore, think that we ought to set aside the judgment and decree passed by the learned Subordinate Judge of the Court below in favour of the plaintiff, and instead thereof we ought to allow the present appeal and dismiss the plaintiff's suit with costs both in this Court as well as in the Court below. The defendants appellants will be entitled to two sets of hearing fees for the two hearings in this Court.

Newbould, J.—I agree.

A. N. R. C.

*Appeal allowed.*

*Before Sir Asutosh Mookerjee, Knight, Judge, and  
 Mr. Justice Walmsley.*

BANESWAR PRAMANIK AND ANOTHER

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*Decree, invalid—Suit against minors—Minors unrepresented.*

When the proposed guardian does not enter appearance and accept the office, the duty of the Court is to appoint one of its officers to act as guardian ad-litem for the infants. Where the Court omitted to take this essential step, but proceeded to decide the suit on a date which had been fixed for the appointment of a guardian and not for the final disposal of the suit, the decree made in the suit against the minors, was inoperative in law, and the execution sale consequent thereupon, was a nullity

Appeal by the Plaintiffs.

Suit to set aside a mortgage decree and the execution sale consequent thereupon.

The material facts and arguments appear from the judgment.

*Babu Hemendra Nath Sen* for the Appellants.

\* Appeal from Appellate Decree No. 1199 of 1915, against the decision of Babu Biraja Charan Mitra, Subordinate Judge of Burdwan, dated the 18th February, 1915, reversing that of Babu Peary Mohan Chatterjee, Munsiff of Katwa, dated the 26th February, 1914.

*Babus Biraj Mohan Mojumdar and Heeralall Sanyal* for the Respondents.

The judgment of the Court was delivered by

**Mookerjee, J.**—This is an appeal in a suit to set aside a mortgage decree and the execution sale consequent thereupon, on the ground that the decree was made under circumstances which render it inoperative as against the plaintiffs appellants. There is no dispute as to the facts which have given rise to this litigation. The defendants instituted a suit against the plaintiffs to enforce a mortgage bond alleged to have been executed by their father. When the suit was instituted on the 25th May, 1905, the present plaintiffs, then defendants, were infants. The Court directed the plaint to be registered. As the defendants were infants and as the plaintiffs had proposed their mother for appointment as guardian-ad litem, the Court recorded an order to the following effect: "Issue notice to the minor and the guardian, fixing the 17th July for appointment of the guardian." On the 17th July, the mother did not enter appearance or signify her willingness to accept the office of guardian-ad-litem of her infant sons. The Court thereupon proceeded to record the following order: "The defendants are absent. Protap Chandra Mojumdar witness for the plaintiffs is examined and Exh I is used as evidence on behalf of the plaintiffs. According to the reasons given in the judgment, the suit is decreed with costs." To use the words of Mr. Justice Trevelyan in *Dakeshur Pershad Narain Singh v. Rewat Mehton* (1), it is difficult to conceive of a case where the formalities of law have been more neglected than in the present instance. When the proposed guardian did not enter appearance and accept the office, the duty of the Court was to appoint one of its officers to act as guardian-ad-litem for the infants. The Court not only omitted to take this essential step, but proceeded to decide the case, although the 17th July, 1905 had been fixed, not for the disposal of the suit but for the appointment of a guardian-ad-litem for the infants. In execution of the decree so made, the properties of the infants were subsequently brought to sale and were purchased by the decree-holders themselves. The plaintiffs now seek to have the decree and the execution sale cancelled on declaration that the decree was inoperative as against them. In our opinion, there is no answer to the suit.

The Subordinate Judge has placed reliance upon the decision of the Judicial Committee in the case of *Walian v. Banka Behari Pershad Singh* (2), which is clearly distinguishable. There, the

(1) (1896) I. L. R. 24 Calc. 25.

(2) (1903) I. L. R. 30 Calc. 1021.

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Judicial Committee held that the proceedings in the earlier litigation showed, on the face of them, that the infants were represented by a properly appointed guardian, although no recorded order of appointment could be traced. In these circumstances, and in the absence of the records of the earlier suit (which had apparently been destroyed), the Judicial Committee ruled that the mere absence of an order to the effect that the mother was appointed guardian-ad-litem did not invalidate the proceedings. In the case before us, on the other hand, the facts are well-established. The mother was never appointed guardian-ad-litem of the minor; indeed, she never entered appearance; and the Court proceeded to decide the suit on a date which had been fixed for the appointment of a guardian and not for the final disposal of the suit. In our opinion, this decree must be treated as a decree made against persons who were not represented in the suit and who consequently occupy the same position as if they were not parties to the litigation. This view is supported by the decision of this Court in *Narsingh Narain v. Sheikh Jahi Mistry* (1) and is also in conformity with the decision of the Judicial Committee in *Rashidunnisa v. Muhammad Ismail Khan* (2). The latter case shows that where infants have not been represented by a guardian duly appointed and competent to represent them for the purposes of the litigation, the decree made against them must be deemed inoperative in law.

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and the suit decreed with costs in all the Courts. It is declared that the decree made in the mortgage suit is not operative as against the plaintiffs appellants and must stand cancelled. The consequence will be that the mortgage suit will stand revived and the mortgagee will be entitled to proceed therewith in accordance with law. The sale consequent on the decree will also stand cancelled and the plaintiffs will be forthwith restored to possession of the property in suit, in execution of the decree of this Court.

A. T. M.

*Appeal allowed.*

(1) (1911) 15 C. L. J. 3.

(2) (1909) 10 C. L. J. 318.

Before Mr. Justice N. R. Chatterjea and Mr. Justice Smither.

ANNADA CHARAN DATTA

v.

MOHIM CHANDRA GUHA.\*

CIVIL.

1917.

April, 27.

*Forfeiture—Disclaimer of landlord's title—Permanent tenure.*

A permanent tenure is liable to forfeiture on the ground of disclaimer of the landlord's title.

To constitute a disclaimer, it must be the renunciation by a party of his character as tenant by setting up a title in a third person or by claiming title in himself.

Appeal by the Defendant.

Suit for ejectment.

The material facts appear from the judgment.

*Babus Joges Chunder Roy* and *Dhirendra Lal Kastgir* for the Appellant.

*Babus Satish Chunder Ghose* and *Ram Doyal De* for the Respondent.

The judgment of the Court was as follows :

Two questions have been raised in this case ; the first is whether there was a forfeiture of the defendants' tenancy by reason of certain statements made by him in a previous suit, and, secondly, whether there can be a forfeiture of a permanent tenure on the ground of disclaimer of the landlord's title.

Taking the second question first, we do not see any reason why a permanent tenure should not be determined by forfeiture. Section III of the Transfer of Property Act lays down that a lease of immovable property determines in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself ; and the lessor does some act showing his intention to determine the lease.

The question was raised in the case of *Kally Dass Ahiri v. Monmohini Dassee* (1) and it was held that a lease notwithstanding that it is permanent is liable to forfeiture under the provisions of the Transfer of Property Act if the tenant denies the title of the landlord. This case is referred to with approval by the Judicial Committee in the case of *Abhiram Goswami v. Shyama Charan Nandi* (2). In dealing with the argument that a mokarari lease is tantamount to a

\* Appeal from Appellate Decree No. 2154 of 1915, against the decree of S E. Stinton Esq, District Judge of Chittagong, dated the 1st June, 1915, affirming that of Babu Rash Behari Barman, Munsiff, 1st Court, of Chittagong, dated the 23rd June, 1914.

(1) (1897) I. L. R. 24 Calc. 440.

(2) (1909) 10 C. L. J. 284 ; I. L. R. 36 Calc. 1003 (1914 and 1915).



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1917.

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Mohlm.

conveyance in fee simple, their Lordships referred to the distinction between the two transactions "well pointed out" by Jenkins J. in his judgment in *Kally Dass's case* (1) and observed as follows:—"Because, at the present day," says the learned Judge "a conveyance in fee simple leaves nothing in the grantor, it does not follow that a lease in perpetuity here has any such result. The law of this country does undoubtedly allow of a lease in perpetuity....A man who, being owner of land, grants a lease in perpetuity carves a subordinate interest out of his own, and does not annihilate his own interest. This result is to be inferred by the use of the word *lease*, which implies an interest still remaining in the lessor. He held, therefore, that, whether the Transfer of Property Act applied or not, such a lease is forfeitable, notwithstanding that it is permanent. In this opinion their Lordships concur." There could thus be a forfeiture of a tenancy although it was a permanent tenure.

As regards the first question, it is contended before us that the statements made do not really amount to a disclaimer of the plaintiff's title. To constitute a disclaimer, it must be the renunciation by a party of his character as tenant by setting up a title in a third person or by claiming title in himself. In the present case, it appears that the defendant in his deposition in the suit for injunction for restraining him from transferring the property in dispute, stated "I had *Tamadi* right to the disputed land. Then Mansur Ali granted me a *pattah* on behalf of the heirs of Buzruk Ali.....I did not pay rent to any body for the land in question.... The plaintiff did never get any rent from me.....I am not a tenant of the plaintiff in respect of the disputed *basha* land. I have said that the plaintiff has no right to the *basha* land. I cannot say what right the plaintiff has got now. I never paid rent to the heirs of Buzrak Ali. I only took a *Bandabast*. I am not willing to pay rent to them as I have a *tamadi* right to the land in question."

It appears to us on reading all the statements together, that they were not merely to the effect that he did not know what the plaintiff's rights were but that there was a clear assertion of the defendant's adverse title to the land. He starts with the statement that he had a *tamadi* right to the disputed land, and that afterwards Mansur Ali granted him a *potta* notwithstanding which he never paid any rent to anybody; and concludes by saying that he was not willing to pay rent because he had a *tamadi* right to the land. These statements have been taken by the Courts below to be an assertion of an adverse title so far as the proprietary right is concerned, and not

(1) (1897) I. L. R. 24 Calc. 440.

merely an assertion of adverse possession to a limited interest. We think that the Courts below are right in the view they have taken of the statements. We are accordingly of opinion that there was a forfeiture of the tenancy.

The appeal accordingly fails and must be dismissed with costs.

A. T. M.

*Appeal dismissed.*

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1917.

Annada

v.

Mohim.

*Before Mr. Justice Walmsley and Mr. Justice Greaves.*

BADAL MIRZA AND OTHERS

v.

TINKARI KOLEY AND OTHERS.

CIVIL.

1917.

June, 29.

*Waqf Property—Alienation, if valid—Refund of money—Charge.*

A mutwali cannot grant a valid *maurasi makarrari* lease of a waqf property: *Jeewun Doss v. Kubeerooddeen* (1) and *Shoojat Ali v. Zumeerooddeen* (2) followed.

In this case, the succeeding mutwali was ordered to refund the *selami* paid for the *makarrari maurasi* lease executed by a previous mutwali and was empowered to raise the sum by mortgage of the waqf property.

Appeal by the Plaintiffs.

Suit to recover possession of land and for a declaration that a *makarrari maurasi* lease executed by a previous mutwali, the plaintiff's father, in favour of defendants Nos. 1, 2 and 3, was void.

The material facts appear from the judgment.

*Babus Satis Chunder Ghose* and *Bhupendra Coomiar Ghose* for the Appellants.

*Dr. Dwarka Nath Mitter*, *Babus Biraj Mohan Mojumdar* and *Jatindra Nath Bose* for the Respondents.

The judgments of the Court were as follows:

**Walmsley, J.**—The plaintiffs as mutwalis of certain waqf property brought this suit to recover possession of land belonging to the waqf and for a declaration that a *makarrari maurasi* lease dated the 30th Aswin, 1313 executed by a previous mutwali—their father Jamir—

\* Appeal from Appellate Decree No. 431 of 1913, against the decree of Babu Latu Behari Bose, Subordinate Judge, 3rd Court of Hooghly, dated the 21st December, 1912, reversing that of Babu Pramatha Nath Bhattacharjee, Munsiff, 1st Court, at Howrah, dated the 6th November, 1911.

(1) (1840) 2 M. I. A. 390.

(2) (1866) 5 W. R. 158.

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uddin—in favour of the defendants Nos. 1, 2 and 3 was void. The first Court decreed the suit on the ground that the maurasi lease was void. On appeal it was held that the lease was not void if it could be shown that there was urgent necessity for granting it and the case was remanded to the first Court for a finding on that question. This remand was based on the authority of the case of *Nimai Chand v. Golam Hossein* (1). On remand, the first Court found that there was no urgent necessity for the lease and, in consequence, it decreed the plaintiff's suit. The lower appellate Court, however, has reversed this finding and dismissed the suit and, in consequence, the plaintiffs have preferred this appeal. As already observed, when the case first went before the lower appellate Court, it was remanded on the authority of the case of *Nimai Chand Addya v. Golam Hossein* (1) and the learned vakil on behalf of the respondents has urged in this Court, first, that that case is an authority which we should follow in this appeal and, secondly, that there is a finding of fact by the learned Subordinate Judge to the effect that there was urgent necessity for the granting of this lease. I think, however, that the circumstances of this case are so very different from those of *Nimai Chand Addya's case* (1) that the principles there enunciated have no application whatever here; and with regard to the suggestion that there is a finding of fact by the appellate Court to the effect stated, I cannot agree because it appears to me that the words of the Subordinate Judge simply come to this that he regarded the substitution of a Pucca Durga for the thatched hut as desirable and prudent. That is not a finding that there was any urgent necessity. Now, if the rule already mentioned is not applicable in the present case, then it appears to me clear on the authorities that this lease is void. It is not necessary to do more than to refer to the cases of *Jewun Doss Sahoo v. Shah Kubeerooddeen* (2) and *Shoojat Ali alias Baboo Meah v. Zumedrooddeen* (3). On the authority of those two cases, I am satisfied that this maurasi lease is void. It is contended, however, on behalf of the respondents that the finding of the lower appellate Court operates as retrospective sanction—as effective as a previous sanction—by the District Judge and, in support of that suggestion, the learned vakil refers to a passage in the case of *Nimai Chand Addya* (1) at p. 187. Again, the circumstances are so entirely different that I do not think the remarks there made have any application in the present case.

The third point which is raised is this that as the then mutwāl-

(1) (1909) I. L. R. 37 Calc. 179; 11 C. L. J. 317.

(2) (1840) 2 M. I. A. 390.

(3) (1866) 5 W. R. 158.

Jamiruddin actually received Rs. 400 by way of *selami*, the present mutwalis cannot have the lease set aside without refunding that sum. I take it that the learned Judge of the lower appellate Court found that, as a matter of fact, the sum of Rs. 400 out of the *selami* was spent by the then mutwali in building the pucca house and I think the present plaintiffs ought to refund that sum. The plaintiffs as mutwalis of the waqf property should refund that sum *minus* such sum as may be due by the lessees for rent in respect of the leased property and also *minus* the sum due to the plaintiffs by the defendants Nos. 1, 2 and 3 by way of the costs of this litigation in all Courts. An account of this sum will be taken by the Munsiff and the mutwalis will be entitled to raise such sum by mortgage of the waqf property or pay the amount so raised to defendants 1, 2, 3 or they can mortgage the property to defendants 1, 2 and 3 to secure the sum found due, the Munsiff will fix the rate of interest under the mortgage. This order does not impose any personal liability on the plaintiffs or on the mutwalis of the waqf property in respect of the sum found due. The Munsiff after taking the account and determining the sum payable by the plaintiffs will fix a date within which the sum so found due is to be paid, or a mortgage to secure the same executed by the mutwalis in favour of the defendants 1, 2 and 3. If the sum so found due is not paid within the time fixed or secured by mortgage the defendants Nos. 1, 2 and 3 will have a charge for that amount on the waqf property.

**Greaves, J.**—I agree.

A. T. M.

*Appeal allowed.*

*Before Sir Asutosh Mookerjee, Knight, Judge and Mr. Justice  
Walmsley.*

SARAJUBALA DASÍ

v.

JOGMAYA DASÍ AND OTHERS.\*

*Suit, valuation of—Court-fee—Suit for administration and accounts—<sup>1</sup>Suit for accounts—Court-fees Act (VIII of 1870), Sec. 7 cl. (IV) (f).*

A suit for administration and accounts is in essence a suit for accounts within the meaning of section 7 clause IV (f) of the Court-fees Act, and, in a

\* Appeal from Original Decree No. 515 of 1914, against the decree of Babu Upendra Chandra Mookerjee, Subordinate Judge of Hooghly, dated the 18th June, 1914.

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suit of this description, the plaintiff is competent to value the claim for accounts approximately and to pay Court-fees thereon. If ultimately a decree should be passed in favour of the plaintiff for a larger amount than that covered by the court-fees already paid, the plaintiff would be precluded by the provisions of section 11 of the Court-fees Act from executing such decree until the fee payable on the whole amount of the decree had been paid.

*Khatija v. Shekh Adam* (1) referred to.

Appeal by the Plaintiff.

Suit for administration, for accounts and for other incidental reliefs.

The material facts and arguments appear from the judgment.

*Babus Brojolal Chuckerbutty* and *Biraj Mohan Mojumdar* for the Appellant.

*Babu Monmohan Bose* for the Respondents.

The judgment of the Court was delivered by

June, 21.

**Mookerjee, J.**—This is an appeal by the plaintiff against an order of rejection of the plaint, in a suit instituted by her against the executors of the estate of her father-in-law for administration, for accounts and for other incidental reliefs. She stated that the value of the estate left by her father-in-law was Rs. 30,000, but she valued the claim for accounts at Rs. 100. She paid court-fees ad valorem on this sum of Rs. 100 and also paid an additional sum of Rs. 10 apparently on the ground that the claim for administration was incapable of accurate valuation, at least at that stage. The defendants contended that the court-fee paid by the plaintiff was inadequate and that the suit could not consequently proceed. Their argument in substance was that, as for purposes of jurisdiction, the plaintiff had valued the suit at Rs. 30,000, she was bound to pay court-fees upon that valuation. The Subordinate Judge thereupon framed an issue to the following effect: 'Has the plaint been insufficiently stamped.' On the trial of this issue, he held that the plaint was insufficiently stamped and called upon the plaintiff to pay additional court-fees of Rs. 965. This order was not carried out, with the consequence that the plaint was rejected. In our opinion the view taken by the Subordinate Judge cannot be supported.

The decision of the Bombay High Court in the case of *Khatija v. Shekh Adam Husenally* (1), shows that a suit for administration and accounts is in essence a suit for accounts within the meaning of section 7, clause IV (f) of the Court-fees Act 1870, and, that, in a suit of this description, the plaintiff is competent to value the claim for accounts approximately and to pay court-fees thereon. Sir Basil

(1) (1915) I. L. R. 39 Bom. 545.

Scott C. J. pointed out that if ultimately a decree should be passed in favour of the plaintiff for a larger amount than that covered by the court-fees already paid, the plaintiff would be precluded by the provisions of section 11 of the Court-fees Act from executing such decree until the fee payable on the whole amount of the decree had been paid. This view is confirmed by a reference to Form 43 of Schedule I of the Civil Procedure Code of 1908 and was adopted by this Court in *Sasi Bhushan Bose v. Maharaja Sir Manindra Chandra Nandy* (1), which arose out of a suit for administration and accounts brought by one of the creditors of a debtor against the trustee of his estate. A similar position had been accepted as sound in the earlier case of *Satya Kumar Banerjee v. Satya Kripal Banerjee* (2). We are clearly of opinion that adequate court-fees had been paid upon the plaint, which could not consequently have been rejected.

The result is that this appeal is allowed, the order of the Court below set aside and the case remitted to the Subordinate Judge in order that it may be tried on the merits. An order will be made in favour of the plaintiff appellant under section 13 of the Court-fees Act entitling her to obtain a return of the court-fees paid on the memorandum of appeal presented to this Court. The appellant is entitled to her costs both here and in the Court below. We assess the hearing-fee in each Court at two gold mohurs.

A. T. M.

*Appeal allowed.*

(1) (1916) 24 C. L. J. 448.

(2) (1907) 10 C. L. J. 503.

## PRIVY COUNCIL.

PRESENT:—*The Lord Chancellor (Lord Buckmaster), Lord Wrenbury, and Mr. Ameer Ali.*

PANDIT SURAJ NARAIN AND ANOTHER

v.

PANDIT RATAN LAL AND ANOTHER.

[ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER  
OF OUDH.]

*Hindu Law—Mitakshara—Joint family—Blending of self-acquired property with ancestral property—Effect of entries in account books as showing whether funds are joint or separate.*

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Jogmaya.

*Mookerjee, J.*

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*January, 30<sup>th</sup>*

1916.

*November, 16, 17,  
20, 21, and 23.*

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Suraj Narain

v.

Ratan Lal.

A, a member of a Hindu joint family whose home was at Lucknow, practised as a pleader at Hardoi, and made considerable savings from his professional earnings. He eventually became managing member, but was all along entrusted with the management of the joint family property in Hardoi. Throughout he kept the accounts of joint property and of his own earnings in one account book. He purchased sundry properties out of the funds so entered in the name of his son-in-law B. and stated that he made such purchases to provide for B :

*Held*, that by blending his private earnings with the receipts and payments on joint account he showed an intention to make them joint property : but that this was not conclusive that all purchases entered in the book were made for the joint family : and that as regards the purchases in the name of B, A's statement that they were made to provide for B was a statement against his own interest and as such admissible in evidence, and that coupled with the other evidence in the case it established B's title to such properties as against the joint family.

In the Hindu joint family the law is that, while it is possible that a member of the joint family should make separate acquisition, and keep monies and property so acquired as his separate property, yet the question whether he has done so is to be judged from all the circumstances of the case. *Lal Bahadur v. Kankhaia Lal* (1) referred to

Consolidated appeals from a judgment and decrees of the Court of the Judicial Commissioner of Oudh (Piggott and Evans, J. C) dated the 30th October 1909 modifying sundry decrees made by the Additional Judge of Hardoi, dated the 27th August 1908. The parties belonged to a family of Kashmiri Brahmins whose history is set out in *Suraj Narain v. Ikbāl Narain* (2). Bishan Narain formed a joint family with his sons, Raj Narain, Ram Narain, Bakht Narain and Suraj Narain. On his father's death in 1867 Raj Narain became the manager of the family. Ram Narain qualified as a pleader and started practice in 1869 at Hardoi—away from the family home which was in Lucknow. Raj Narain died in 1890, and Ram Narain then became manager, but continued his practice as before at Hardoi. From 1869 till his death in 1900 Ram Narain kept account books in which he entered all his receipts and expenditure. The account books of the joint family continued to be written as before at Lucknow. Ram Narain's daughter was married to Ratan Lal, respondent, who lived with his father-in-law for some time, and afterwards left him to reside in a native state where he was employed. Ratan Lal sent sums of money to his father-in-law from time to time, and Ram Narain purchased considerable properties in the name of Ratan Lal. On Ram Narain's death it was claimed on behalf of the joint family that all properties so purchased by Ram Narain stood *ismfarsi* in Ratan Lal's name and formed part of the joint family property. The

(1) (1907) L. R. 34 I. A. 65 ; 5 C. L. J. 340 ; I. L. R. 29 All. 244.

(2) (1912) L. R. 40 I. A. 40 ; 17 C. L. J. 288 ; I. L. R. 35 All. 80.

Additional Judge held that most of the properties in dispute were purchased with Ram Narain's money, and that the family undoubtedly ly possessing a nucleus of ancestral property, the properties so purchased by Ram Narain really belonged to the joint family. The appellate Court held that the transactions impugned as *ismfarzi* were not of that nature, and that in any case the properties were purchased by Ram Narain with his self-acquired income over which he had full powers of disposal, and that having regard to the circumstances of the case and the statement (quoted in their Lordships' judgment) of Ram Narain himself the purchasing of the property in the name of Ratan Lal was by way of gift to him and to his wife. Piggott, J. C. (in whose judgment Evans J. C. concurred) summed as follows:—

"For the reasons given, I am of opinion that the fair conclusion upon the evidence is that the money invested by Pandit Ram Narain in favour of Ratan Lal and Madan Mohan Lal, in so far as it was not an investment of money remitted to Ram Narain by Ratan Lal for that purpose, consisted of Pandit Ram Narain's own self-acquired property over which he had full rights of control and disposal. His intention in making these investments would appear to have been expressly to prevent this money from blending with the joint property of the family, and to make provision out of it for the benefit of his only daughter, as well as to give expression to the affection felt by him for his son-in-law Ratan Lal. This I may note is substantially the view taken by the District Judge of Hardoi in a rent suit to which Pandit Bakht Narain and Pandit Ratan Lal were parties which came before him for disposal, and I think he put the case very fairly in the said judgment which is on record as Exhibit F 81. Before leaving this part of the case, however, I wish to add a few words upon another point. I am by no means satisfied that, event apart from my finding that the gifts in favour of Ratan Lal and Madan Mohan Lal were made by Pandit Ram Narain out of his self-acquired property, the plaintiffs would in this case be entitled to succeed, at any rate as regards the bulk of the property in dispute, once the main issue regarding the *ismfarzi* nature of the transactions was decided against them. The position of Pandit Ram Narain must be considered first as it stood before he became manager of the joint family on the death of his brother Pandit Raj Narain in August 1890, and secondly as it stood after that date. Up to the year 1890 we have Ram Narain living, exercising his profession as a pleader, and carrying on business as a banker and dealer in cloth at Hardoi, while his brother Pandit Raj Narain, the manager of the joint family, resided, practised and carried on business at Lucknow. With the

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consent of the manager of the joint family Pandit Ram Narain was allowed the control of a portion of the joint family property, consisting of shares in villages acquired by purchase, or on usufructuary mortgage, or taken on farm from Government in the District of Hardoi. The oral evidence of some of the Ziladars and other estate servants produced by Pandit Ikbāl Narain as witnesses in this case shows that the income of some of the Hardoi villages was ordinarily remitted direct to Pandit Raj Narain at Lucknow; but no doubt in the main the control of the income arising out of the immovable property owned by the family in the Hardoi District was in the hands of Pandit Ram Narain. We do not know with any certainty how accounts were settled up between Ram Narain and Raj Narain, and how they stood to one another with reference to their respective enjoyment of the income of the joint family property which came into their hands; but it is fairly presumable that Pandit Ram Narain was allowed by his elder brother to spend a certain portion of the joint family income according to his own will and pleasure, as representing an allowance made to him for his personal enjoyment out of the joint family funds. Now if it be conceded, though I am not prepared to do so except for the sake of argument, that the investments made by Pandit Ram Narain in favour of Ratan Lal and Madan Mohan Lal were drawn partly, or even wholly, from that portion of the joint family income thus left to his control and disposal, what would now be the position of the plaintiffs with reference to these investments? Suppose Pandit Ram Narain had simply squandered the money in riotous living; suppose he had made large gifts of cash or jewellery in favour of some woman of bad character on whom he was besotted; or suppose he had made large gifts in favour of some religious teacher, or of some political cause to which he had become violently attached, would the plaintiffs now be entitled to call in question these transactions, or to pursue in the hands of donees property which could be proved to have been acquired by means of these donations? I conceive not. We know that Pandit Raj Narain himself as manager of the joint family never called in question any of these transactions. If he has felt dissatisfied with Pandit Ram Narain's management of the joint family property he would have been entitled to take the same under his own control, and to limit Ram Narain strictly to the enjoyment of such earnings as might admittedly represent his own self-acquisitions, together with such specific allowance from the joint family funds as he in his capacity of manager might see fit to make. He might, if very seriously dissatisfied with his younger brother's conduct, have

brought a suit for partition, or have taken such stringent measures towards excluding Ram Narain from the enjoyment of the joint family property as would have driven the latter to sue for partition on his own account. In such suit for partition there might also have been a settlement of account, and issues might have been raised as to whether the money squandered by Pandit Ram Narain, or used by him for purposes to which joint family funds should not have been applied, might not be assigned to Pandit Ram Narain's own share, as having been drawn by him in advance from the *corpus* of the family property. I very much doubt, however, whether any suit would have been maintainable against the donees for the recovery of money given them by Pundit Ram Narain, not out of the *corpus* of the joint family property or by alienation of immovable property belonging to the joint family, but out of the income enjoyed by him with the consent of the manager. In any case we know that as a matter of fact Pandit Raj Narain made no attempt in his life-time to interfere with any of the dispositions in favour of Ratan Lal or Madan Mohan Lal which it is now sought to call in question. From the month of August 1890 onwards to the time of his death, Pundit Ram Narain occupied the position of manager of the joint family. In this capacity his control over the joint family funds would extend so far as to permit him to make gifts of affection to a reasonable and proper extent out of the income of the joint family property. I may refer on this point to *Bachoo Harkisondas v. Mankorebai* (1). The rights of the other members of a joint family to control wasteful or improper expenditure of the income on the part of the manager rests principally upon their right at any moment to claim a partition, accompanied by a proper settlement of accounts. The question how far they would be entitled to sue for the revocation of gifts made out of the income by the manager of a joint family seems to me at least a doubtful one, and might depend upon the particular circumstances of each case. In the present case at any rate we know that no objection was taken by any other member of the family in Pundit Ram Narain's life-time to any dispositions made by the latter in favour of his son-in-law or his daughter's son. It is only after Pundit Ram Narain's death that the plaintiffs come into Court with the plea that, even supposing the property now in possession and enjoyment of the defendants Ratan Lal and Madan Mohan Lal was received by them by means of gifts made by Ram Narain, such gifts should be held to be invalid and the defendants liable to restore or account for

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the same. From every point of view this part of the plaintiff's case in my opinion fails." Hence these appeals.

A. M. Dunne, for the Appellants : There were two questions for determination : (1) Whether there is sufficient evidence to show that Ram Narain so blended his self-acquired property as to make it joint. (2) If the purchases were made with the joint funds the results of the blending, was the claim of the respondent maintainable? As to the first, it has been concurrently found that the family was joint and undivided, and that for some years Ram Narain was its manager. The whole property possessed by the members of the family ought to be presumed to be joint and the burden of shewing that it was not joint lay on the respondent: *Luximon Row v. Mullar Row* (1). The purchases in Ratan Lal's name were *benami*. In such cases the test is the source from which purchase money was paid: *Dhurm Das v. Mt. Shama Soondri* (2). There is no presumption of advancement in India. On the contrary the presumption is in favour of its being a *benami* purchase unless the contrary is shown: *Gopeekrist Gosain v. Gungapersaud* (3) and *Prankishen Paul v. Mathooramohun* (4). There was nothing to show that Ram Narain made any distinction between his professional earnings and the income from the family estate. The accounts kept by him indicate that both incomes were blended together and the statement of Ram Narain showed that all was joint. The present case falls within the principle laid down in *Lal Bahadur v. Kanhaia Lal* (5).

As to the second point the respondent has failed to prove that any gift was made to him nor was a gift of such valuable property by the manager of a joint family to his daughter warranted by the Hindu Law.

L. De Gruyther, K. C., and B. Dube, for Ratan Lal submitted that Ram Narain did not blend his professional income with the joint funds. The real test is—Did Ram Narain throw his own self-acquired income into the common stock? There was no evidence that he did so. The system of accounts that he adopted only shewed that he made entries of all his receipts and expenses in one book. But he kept other account books also which have not been produced by the plaintiffs and which would have shown that he kept the funds of the joint family separate from his own. In the case of *Lal Bahadur v. Kanhaia Lal* (5) there was one common stock, and the members of the family were father and son. Ram Narain became

(1) (1831) 2 Knapp. 60.

(2) (1843) 3 M. I. A. 229 (240); 6 W. R. P. C. 43.

(3) (1854) 6 M. I. A. 53.

(4) (1865) 10 M. I. A. 403.

(5) (1907) L. R. 34 I. A. 65; 5 C. L. J. 340; I. L. R. 29 All. 244.

manager after 1890. Ram Narain had absolute power to dispose of his professional income, and that he did by purchasing properties in Ratan Lal's name for the benefit of his daughter. The purchase was not *benami* or *ismfarsi*. It was made with the deliberate object of providing for his daughter and her children. His statement made in 1899 and his conduct showed that gift was intended and made. There was no reason for the transaction to be *benami*.

In *Gopeekrist Gosain's case* (1) the family were joint and the purchase was made by the father in his son's name. But here all the circumstances point to the fact that Ram Narain intended that the beneficial interest in the properties purchased with his funds should belong to the respondent and his wife. Reliance was placed on the following authorities: *Obhoy Churn Mookerjee v. Panchanan Bose* (2); *Rajah Chundernath v. Ramjoy* (3); *Nawab Azimut Ali v. Hurdwaree mull* (4); *Uman Parshad v. Gandharp Singh* (5).

The Courts below were right in respect of the properties to which section 317 of the Code of Civil Procedure of 1882 applied.

*Dunne* in reply: The case of *Obhoy Churn* (2) was distinguishable. It was under the Dayabhaga Law under which the money belonged to the father, but here the money was joint property.

The statement (quoted in their Lordships' judgment) made by Ram Narain in 1899 was inadmissible in evidence: section 32 (3), Evidence Act did not apply as it was not against the interest of Ram Narain. He was interested in supporting a gift of a portion of the joint family property which he had illegally made. It was a statement made in his own favour rather than against himself. Some properties were purchased in Ratan Lal's name at auction sales, and both Courts have held that section 317, Civil Procedure Code (1882) precludes the plaintiffs from claiming them. As to that reference was made to *Bodh Sing v. Gunesh Chunder* (6). *Sankunni Nayar v. Narayanan* (7).

The judgment of their Lordships was delivered by

**The Lord Chancellor (Lord Buckmaster):**—In April 1867, Bakhshi Bishnu Narain died, leaving four sons, whose names in order of birth are: Raj Narain, Ram Narain, Bakht Narain and Suraj Narain. The family was a Hindu joint family, governed by the Mitakshara law

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(1) (1854) 6 M. I. A. 53.

(2) (1863) Marshall 564.

(3) (1870) 15 W. R. P. C. 7; 6 B. L. R. 303.

(4) (1870) 11 M. I. A. 395; 14 W. R. P. C. 14; 5 B. L. R. 578.

(5) (1887) L. R. 14 I. A. 127; I. L. R. 15 Calc. 20.

(6) (1873) 12 B. L. R. 317 (329) P. C.

(7) (1893) I. L. R. 17 Mad. 282.

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and possessing ancestral property. Accordingly, upon his father's death the eldest son, Raj Narain, became Karta, and so continued until his death in August 1890. His brother, Ram Narain, then succeeded and acted as Karta until his death in October 1900. Disputes then arose between Bakht Narain and Suraj Narain as to Bakht Narain's claim to be registered as Karta and as to their rights and the rights of their respective sons in the joint family properties. Some arrangement and reconciliation of this family quarrel, though one neither firm nor durable, seems to have been effected, but disputes broke out again with regard to the property, and four suits were instituted on the 3rd November, 1903, by Bakht Narain, and a fifth suit in 1905 by Suraj Narain who claimed a half share in the entire joint estate. These appeals are consolidated appeals in those suits, the question for determination being whether certain very numerous properties acquired since the death of Bakhshi Bishnu Narain are joint property. The appellants, who are certain members of the joint family, contend that they are. The respondent, who is the son-in-law of Ram Narain, says that they are not. The Subordinate Judge decided in favour of the present appellants. The Court of the Judicial Commissioner of Oudh reversed that decision. Hence these appeals.

Raj Narain had no son. Ram Narain also had no son, but had one daughter, to whom her father was much attached. She married Ratan Lal, the respondent, who contends that the disputed properties were either bought with his money or were given him by Ram Narain, and for those reasons are his own, or, at any rate, are not joint property.

The material facts that led up to this dispute are these :—

From about the year 1864 to the year 1880, or, perhaps later, Raj Narain practised as a pleader at Lucknow. In the year 1869 Ram Narain, who was then 23 years old, left Lucknow for Hardoi, and from that year onwards practised as a pleader at Hardoi. He was successful, and later in life became a rich man. Before 1890, while Raj Narain was Karta, and after 1890, when Ram Narain was Karta, properties were acquired at Hardoi. They were taken in various names—that of Raj Narain, that of Ram Narain, that of Ratan Lal, those of Ratan Lal and of his son Madan Mohan Lal, and of other persons. The books of account of the family property were kept at Lucknow, where Raj Narain lived ; but Ram Narain, who was at Hardoi, acted as manager of the properties at Hardoi as well before as after 1890. He bought properties at Hardoi, receiving, at any rate in one instance which is proved (that of the village

Mahora), money from Lucknow to make the purchase, and he received income and made disbursements in respect of joint family property at Hardoi. But the purchases at Hardoi were made to a large extent not with joint family monies, but with fees earned by Ram Narain in his practice as a pleader, and it is with these properties that these appeals are concerned. Under these circumstances their Lordships have taken as the first question to be answered in order to adjust the rights between the parties this question :—

Whether there is sufficient evidence to show that Ram Narain so blended his own property with the joint property as to make the whole joint property.

In the Hindu joint family the law is that, while it is possible that a member of the joint family should make separate acquisition, and keep monies and property so acquired as his separate property, yet the question whether he has done so is to be judged from all the circumstances of the case. The latest authority is *Lal Bahadur v. Kanhaia Lal* (1). The facts there were that in 1866 a partition of ancestral property had been effected between three brothers. The question arose in the case of one of the brothers who had thus taken his third share of the ancestral property. He had children. From the year 1852 onwards he had earned money as an official of the Indian Education Department, which he had paid into the same banking account as monies admittedly joint. The question was whether these earnings were joint property. This Board held that they were. The dominant sentence in the judgment is as follows :—

“It is admitted that Durga Parshad and his sons lived together as a joint Hindu family, and it is established that there was a considerable nucleus of ancestral property in his hands after the partition. The onus was, therefore, on the respondent to prove that his subsequently acquired property was his separate estate.”

Their Lordships call attention to the fact that the person here spoken of as having ancestral property “in his hands” was the Karta. Down to 1890 Ram Narain was not the Karta. After that date he was. The decision, therefore, applies in strictness to the present case only from that date. Further, in that case the father was the Karta and not, as in the present case, a brother. But in the facts to be presently stated their Lordships find that the decision has a very close application to the present case.

The position with regard to the private earnings of Ram Narain is this : It has not been established that any circumstances existed

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from which it could be inferred that there was any joint family estate in the separate earnings of the four brothers, and it must be accepted that the earnings of Ram Narain were monies which he was at perfect liberty to use in any manner that he thought fit. At the same time, it would be quite consistent with the principle which regulates joint family estates that he should in fact have brought them into the joint property and made them part of the whole. The question is : Has he done so ?

There is really little or no direct evidence upon the point except the books of account that he kept, supplemented by his own verbal evidence in a suit that was decided in 1893. But this evidence is important, and, in their Lordships' view, throws considerable light upon the true history of the case. The book of account that he kept, apart from the books of a cloth business carried on at Hardoi and admittedly joint property, and separate registers and accounts of each of the villages, was a book which appears to have been in the same form and continued from 1869 down to the date of his death. It is not strictly an account book at all, but a book in which is recorded from day to day various payments and receipts of money from different sources, and undoubtedly it includes—and, so far as their Lordships are aware, it is the only book that includes—the receipts of his earnings as pleader and his private payments. For the year 1876 the book has been placed *in extenso* in the record. This year has been selected as a typical year, and their Lordships have accepted it as characteristic of the accounts throughout the whole material period of time. In addition to receipts from his professional income, it shows receipts from several properties which are admittedly joint properties, and, although the books and materials were open for the respondents' inspection, and these books included the register of the villages admittedly owned by the joint family in the Hardoi district, it has been impossible to show that these entries do not include receipts from all the joint properties that were then under Ram Narain's management. The entries also undoubtedly show certain payments of joint accounts, and in the case of the Mahora village they show the receipt of money from the joint family estate and its application in the purchase of this property. There are entries of revenue payments in respect of villages which were joint property ; of income received from such villages ; of fees received for professional work as pleader ; of payments for the purchase of villages—e.g., the village of Samrehta, which was acquired in the name of Raj Narain the Karta in July 1876 ; the villages of Kasmundi and Backharwa, acquired in the name of Raj Narain in the same month ;

the village of Masit, acquired in December 1876 in the name of Ram Narain ; of payments made to servants at Lucknow on account of their pay, and so on. The account may be called an "omnibus" account, into which Ram Narain's professional fees are carried in common with other items such as described, and from these mingled sources a balance is struck day by day, and the whole account is abstracted and summarised at the end of the year. The receipts amount to Rs. 27,206-13-8, of which Rs. 2,866-4-9 are fees, Rs. 12 are presents, Rs. 1,578-3-6 are income from "personal villages on account of village Mahora" and from "joint villages"; Rs. 2,819-6-3 are "from the account of the personal and the leased villages," and so on. On the other side are "purchases, Rs. 16,056-14-0," among which the villages of Masit, Samrehta, and Kasmundi are found. As the result, a credit balance of Rs. 189-1-6 at the beginning of the year becomes a credit balance of Rs. 141-11-1 at the end of the year.

Now there is nothing whatever to show that out of this account payments were from time to time transmitted to the joint family accounts that were kept at Lucknow, and this, in their Lordships' opinion, is a most material matter because, if no such remittances were made, it follows that the balances that were carried forward from time to time and brought into account against future purchases were blended balances of Ram Narain's own earnings and of joint monies and that they remain so blended throughout the whole period of time. It is quite true that, as time went on, other monies were also entered in these accounts which cannot be regarded as joint. There were monies received from Krishna Lal and Ratan Lal, from his daughter, and, it may even be, from other sources, and it is urged that these monies cannot possibly be regarded as blended with the joint family estate, and that therefore Ram Narain's private earnings ought equally to be regarded as outside the joint property. But this argument is not conclusive, because these monies, regarded as the monies of Krishna Lal, Ratan Lal and his wife, were not the monies of people sharing in the joint estate, and were incapable of being blended in the manner suggested and they would remain monies for which Ram Narain would be liable to account; but his own means stood in a different position, and if their association with the joint family monies in the account in the manner mentioned would be sufficient evidence of their being blended, the mere fact that other monies were there also would not necessarily destroy the value of the inference.

The respondents had the means of showing before the Subordinate

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Judge that this system of account could be and was explained, e.g., that this was but an omnibus book, and that he kept a separate joint property account. The respondents did not do so. The Subordinate Judge had all the books before him. Their Lordships have not. He concluded that the appellants were right. Their Lordships are not prepared to differ from him as to the effect of the books, all of which he saw and some of which their Lordships have seen. They have looked carefully to see what the Judicial Commissioners held on appeal as regards this part of the case. They express themselves as "perplexed" by the entries and found it "impossible to arrive at any certain conclusion as to the system on which these various account books were kept up." Their Lordships are not prepared to stop at the point of perplexity. They think that the books blend Ram Narain's professional earnings with his receipts and payments on account of joint properties, and thus afford evidence upon the question under consideration.

A second and most important head of evidence is found in a deposition made by Ram Narain, on the 5th August, 1893. This was three years after he became Karta. He says:—

"The money was of our family, partly on account of savings from my practice and partly from remittances from Lucknow. The sale deeds are in names of Raj Narain and some in my name too. I did not send any money in cash to Raj Narain from Hardoi. He never asked me to send."

And in cross-examination:—

"Money was not sent from Hardoi, as property was being purchased there. The proceeds of sale of ancestral villages and other ancestral money were used in villages in this district and also in other work of the family. No profit was [*sic*] ever took place in our family. My father had four sons: viz., Raj Narain, eldest, myself, Bakht Narain, and Suraj Narain. We were all joint and all family property was joint. Partition never took place. One member of the family works as manager. Raj Narain was manager and now I am manager. I, Bakht Narain, and Suraj Narain are still joint."

Their Lordships cannot find that the Judicial Commissioners gave any effect to this evidence. It is plain and directly to the point, and they have found no answer to it.

This conclusion, however, does not determine the case. Some of the properties that are in dispute are properties that were purchased in the name of the respondent, Ratan Lal, and it is still open to him to show that each of those transactions represented a gift from Ram Narain to himself. This question also is singularly destitute

of direct evidence. There is an undoubted foundation from which such an intention could be readily assumed. Ram Narain was on terms of very close and intimate affection with his daughter. She was his sole child, and the formal phrase Nurchasmi, under which he constantly referred to her, conveyed more than a formal meaning. Ratan Lal, his son-in-law, also shared his affection, and seems to have made considerable sacrifices in return. He allowed his wife to stay in her father's house, and in the disputes which divided the family he took the side of Ram Narain against his own parents, and it is said, was therefore disinherited. Ram Narain undoubtedly received from his son-in-law monies for profitable investment, and the suggestion that these monies might be regarded as returned by the payment of certain household expenses is one repugnant to the best ideas and traditions of a Hindu family, and one which their Lordships wholly reject. It is therefore easy to infer that Ram Narain had many motives which would prompt him to make abundant provision for his daughter and her husband, neither of whom would in the absence of such provision have any share in his estate.

But even with this presumption, the mere fact of purchases of properties in the name of Ratan Lal would not of itself be sufficient to show that they were intended as a gift, but their Lordships think that evidence is not wanting to make the inference complete, and that evidence is contained in the statement of Ram Narain himself. Their Lordships are in entire agreement with the Subordinate Judge and the learned Judicial Commissioners in holding that the statement of Ram Narain made in 1899 is properly admitted in evidence. It was a statement which, whether the property was joint or whether it was his own, it was against his own personal interest to make, since in effect it declared that the properties there referred to were those of Ratan Lal; nor do their Lordships see any reason why it should be discredited; and if accepted it furnishes sufficient evidence, taken in connection with the circumstances, to support the claim of Ratan Lal. It is in these terms:—

"The capital outlay required to pay the arrears of revenue was provided partly by me and partly by Ratan Lal. The profits will be enjoyed entirely by him. I manage this estate for him and also his other zamindari in the District. I have bought a lot of zamindari in his name, in order to make provision for him, as against my adopted son, who would be my heir."

Their Lordships do not think that this evidence and that given in 1893 are irreconcilable. The former related to a period different

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from the latter, and it does not follow that they cover the same transactions. Upon the view which their Lordships have already expressed, Ram Narain did blend his own monies, with the joint family monies, and purchased property in his own name and that of Raj Narain which must be regarded as joint estate; but this does not necessarily lead to the conclusion that the properties purchased in the name of Ratan Lal were of the same character. It is admitted that there were abundant monies coming from the private earnings of Ram Narain to furnish the consideration for these purchases, and that he was at full liberty to use them for that purpose if he so desired. But if once the intention to buy them for Ratan Lal be accepted, as their Lordships think it must, there only remains the question as to whether these monies had been so dealt with by Ram Narain before his purchase as to put it outside his power to gratify the intention of making the gift. The material before their Lordships does not lead them to this conclusion. Remembering that Ram Narain had full power to deal with his earnings as he thought fit, the fact that he blended those that were not otherwise used does not mean that every entry of a purchase in the book is an entry of a transaction so dealt with that it must be regarded as joint property. If, for example, having monies of Ratan Lal's in his own hands, he either by using his own monies or by borrowing on his own account obtained the funds necessary for the purchase of the property in question, and such properties were brought with the intention of benefiting Ratan Lal, the mere fact that the transactions were recorded in the books which also recorded the receipts of his own and the joint monies would not prevent them being used for that purpose, and this view appears to have been taken by the Subordinate Judge; but if this be so it appears to their Lordships to apply equally to purchases made with Ram Narain's monies alone, when once it is accepted that they were used with the intention of making a gift. The learned Judicial Commissioners appear to think that even assuming that they had been blended in the first instance, there was nothing to prevent Ram Narain from making this use of them, and there would appear to be some support for this view in the fact that similar joint monies were apparently used for the endowment of the daughter of Ikbal Narain.

Their Lordships do not, however, think it is necessary to rely on this circumstance. For reasons already given, they think that the gift in favour of Ratan Lal may be regarded as established so far, but so far only, as the properties are concerned in the Hardoi district, which were bought in the name of Ratan Lal alone.

There only remains one further point for consideration, and that affects certain properties, Nos. 1—4 inclusive and No. 32 in List 5, which were purchased at auction at a sale under order of the Court in the name of Ratan Lal. Their Lordships were satisfied that any claim to these properties by the appellants is defeated by section 517 of the Civil Code.

Their Lordships will therefore humbly advise His Majesty (1) that these appeals ought to be allowed in part ; (2) that the decrees of the Court of the Judicial Commissioner of Oudh respectively, dated the 30th day of October, 1909, and the decrees of the Court of the Additional Judge of Hardoi respectively, dated the 27th day of August, 1908, as regards the following properties which have not been in question upon these appeals ought to be affirmed : List V annexed to plaint in Suit 1 of 1908, Item 23, Mauza Gobardhanpur, 2 Biswas ; List VIA annexed to plaint in Suit 1 of 1908, Item 1, houses and shops in Hardoi Khas ; List VIII annexed to plaint in Suit 1 of 1908, Item 42, decree in Suit of Pandit Ratan Lal v. Sripal Singh, and the business carried on in the cloth shop at Hardoi ; (3) that it ought to be declared that the appellants are also entitled to the following properties ; List V annexed to plaint in Suit 1 of 1908, Item 30, Kashmiri Bagh Sitlaji, Item 31, half share of the land at Pakra ; List VIA annexed to plaint in Suit 1 of 1908, Item 19, land at Suklapur, Item 20, land at Thok Khala, Item 21, land at Thok Uncha ; List VIII, annexed to plaint in Suit 1 of 1908, Item 34, decree against Pandit Ram Naram, Item 35, agreement for costs ; (4) that the appellants' claim to the remaining properties ought to be dismissed ; (5) that in other respects, except as to costs, the decrees of the Court of the Judicial Commissioner ought to be set aside ; (6) that subject to the aforesaid declarations and modifications the decrees of the Court of the Additional Judge ought to be restored ; and (7) that the parties ought to bear their own costs of these appeals.

*James Gray & Son* :—Solicitors for the Appellants.

*T. L. Wilson & Co* :—Solicitors for the Respondents.

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*Appeals allowed in part.*

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PRESENT : *Viscount Haldane, Lord Atkinson, Sir John Edge  
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BISHAMBHAR DAS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE FOR THE  
NORTH-WESTERN PROVINCES, ALLAHABAD.]

*Libel—Caste dispute—Publication of resolution of caste Panchayat—Privilege—  
Whether destroyed by irregularity in passing resolution.*

B, the chowdhri or chairman of one of a caste panchayat, in his capacity as chowdhri communicated to another section of the caste and also circulated to other members of his section a resolution of the panchayat of his section suspending social relations with G's family. In an action for libel brought by G against B, it was contended that G. had no proper notice of the meeting of the panchayat, and that in consequence the passing of the resolution was contrary to natural justice, and B. was not privileged in publishing it.

*Held*, that it was the duty of B. to give effect to the decisions of the panchayat and to communicate the result of its proceedings to parties interested; that the other section of the caste and other members of B's own section were interested in the decision communicated to them; that in making the communication B. acted in the discharge of the duty imposed on him; and that the occasion was privileged.

*Held, also*, that unless it could be shown that B. was bound to examine into the regularity and correctness of the panchayat's decisions before communicating it to parties interested in the question under decision, the privilege was not affected or rebutted by want of or irregularity in notice.

-To defeat or rebut privilege, the law does not recognise anything short of actual or express malice in the publication of the matter which is charged to be libellous : *Teogood v. Spyring* (1) ; *London Association for Protection of Trade v. Greenlands, Ltd.*, (2) ; and *Adams v. Ward* (3) referred to.

Appeal from a decree of the Allahabad High Court (Tudball and Mahomed Rafiq, JJ.) dated, March, 16, 1914, reversing a decree of the Subordinate Judge of Benares.

The facts of the case are sufficiently stated in their Lordships' judgment.

*Sir H. Erle Richards, K. C.*, and *Dubé*, for the Appellant : submitted that the occasion was not privileged because the resolution was not passed regularly but contrary to natural justice, there being a neglect of the requirement that the accused should be present or be given an opportunity of being present. Alternatively, there is evidence

(1) (1834) 1 C. M. & R. 181.

(2) (1916) L. R. 2 A. C. 15.

(3) Not reported.

of malice. It is true the defendant was agent of the panchayat, but if the principal is not privileged then the agent is not privileged.

Plaintiff had no notice of the meeting of the panchayat. At the meeting the members present knew that he was at Calcutta. It is made a charge against him that he had not signed a certain *cluttha*: he never had the chance of signing it. It is also charged that he did not attend the panchayat: how could he when he was at Calcutta and had no notice?

[Lord Atkinson: referred to *Chamberlain v. Boyd* (1)].

(Their Lordships asked to be satisfied that the Court has power to restrain a panchayat from excluding a man from caste).

On this question reference was made to Odgers' Law of Libel and Slander 5th Edition, page 287 (Chapter 10, Qualified Privilege); *Krishnasami Chetty v. Virasami Chetty* (2); *Vallabha v. Madusudan* (3); *Keshaviah v. Bai Girja* (4); *Coopposami Chetty v. Duraisami Chetty* (5); *Jagannath Churn v. Akali Dassia* (6); *Advocate General of Bombay v. David H. Devaker* (7); and *Appaya v. Padappa* (8); *Ram Kant v. Ram Lochun* (9).

The Courts in India regard the caste interest as of so great a value that they specially protect it; and these cases show that they will intervene on behalf of those expelled from caste on grounds contrary to natural justice.

The words of the resolution suggested that plaintiff had refused to accept a reasonable opportunity to appear and clear up his position. The panchayat have no right to pronounce a decision contrary to natural justice. The issue as to notice is decided by the High Court against the plaintiff; but the Subordinate Judge was right in holding that the notice was not sufficient, and also that there was malice on the defendant's part in procuring the passing of the resolution.

The libel is in the communication to Pachhain section. It publishes the decision to suspend social relations with the plaintiff, and is defamatory and actionable. The defence may be privileged, but that can only be if they have acted properly; the statement was not made honestly, in the sense that the plaintiff had no opportunity of appearing.

Both the Courts below have found that the statements are defamatory. There is no analogy between a voluntary association, like a club, and a caste. Outcasting in India is far more than turning a

(1) (1883) 11 Q. B. D. 407.

(2) (1886) L. L. R. 10 Mad. 133 (144).

(3) (1889) L. L. R. 12 Mad. 495.

(4) (1899) L. L. R. 24 Bom. 13 (21).

(5) (1909) L. L. R. 33 Mad. 67.

(6) (1893) L. L. R. 21 Calc. 463.

(7) (1886) L. L. R. 11 Bom. 185.

(8) (1898) L. L. R. 23 Bom. 122.

(9) (1859) S. D. A. 535.

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man out of his club; many of a man's rights are affected by it. Hence to say a man is an outcaste is *per se* defamatory.

Whether there was privilege depends on two things:—

(1) Had the panchayat jurisdiction? and

(2) If they had, did they exercise it according to the rules of natural justice?

So far back as 1848 suits have been entertained for reinstatement to caste. In that year it was decided in express terms that a Mahomedan who had been improperly expelled should be restored to caste: *Soonaoollah Koolal v. Mohussun Koollal* (1).

This was followed in 1859 in the case of a Hindu Brahmin, the acts charged against whom were not such as to justify expulsion. The Court went into merits and held that the man was entitled to reinstatement: *Ram Kant v. Ram Lochan* (2)

The question is whether the *panch* had jurisdiction. The High Court held they had, but it is submitted they had not.

Reference was also made to *Venkatachalapati v. Subbarayadu* (3) and Bengal Civil Courts Act, 1887, section 37.

*A. M. Dunne* for the respondent, was not called on.

There Lordships' judgment was delivered by

**Mr. Ameer Ali**:—This appeal arises out of an action for libel brought by the plaintiff in the Court of the Subordinate Judge of Benares, where the parties reside and carry on business. Both belong to the Agarwala Vaishya caste of Hindus, and both appear to occupy an influential position in their community.

The Agarwalas of Benares are divided into two *Tarsor* sections, one called the *Purbia* or "Eastern," the other *Pachhain* or "Western"; but in doctrinal matters and caste observances there seems to be no difference between them. The inter-communal government of each section is vested in a *Panchayat* composed of the general body of its members, which so far as appears on the record, has the authority to enforce the due observance of the caste rules. In this connection it should be mentioned that there are numbers of Agarwalas in the neighbouring towns of Mirzapore and Chunar with whom the Benares Agarwalas maintain close social relations.

The proceedings in this case show that many of the Agarwalas of Benares take a much stricter view of the doctrines of their religion than most of their fellow-castemen, especially in Western India; and in no respect is the difference more pronounced than on the question

(1) (1848) 4 S. D. A. 541.

(2) (1859) S. D. A. 435 (536).

(3) (1890) I. L. R. 13 Mad. 293.

of a sea voyage undertaken by a Hindu. Whilst other Hindus, including Agarwalas, hold that a purification ceremony technically called *Prayaschitta* absolves the sin incurred by a voyage across the seas, the Benares Agarwala holds firmly to the doctrine that the taint the offender contracts is beyond absolution. In recent years, however, a strong body of public opinion has been growing up which considers this extreme view to be not only illiberal and opposed to the spirit of the times, but also as unwarranted by the *Shastras*. The plaintiff seems to be the protagonist of this school of thought. The controversy between what may be called for the purposes of this judgment the orthodox section, and the comparatively smaller body of reformers assumed an acute character with the return to India in May 1910 of one Babu Laksmi Chand, also an Agarwala belonging to the "Western" section. He appears to have been sent to England as a Government scholar, and to have had in this country a meritorious career. On his arrival, however, at home he was promptly put out of the caste by the *Panchayat* of his section. His academical distinctions in England were appreciated by the advanced and liberal-minded people of his community, who received him with marks of esteem and respect; and after he had gone through the *Prayaschitta* ceremony they gave a dinner in his honour, at which several of the younger members of the plaintiff's family are said to have been present. This seems to have offended the religious feelings of the orthodox; a *chittha*, or "declaration of faith," was drawn up, it is said, at the instance of the defendant (whose position in the *Panchayat* will be explained later on) and circulated for signature among the members of the caste. It is alleged by the defence, but denied by the plaintiff, that this document was presented to him, and that he declined to attach his name to it. On his side, he issued to his caste-people and others a public appeal, in which he pleaded for toleration and a more liberal interpretation of the religious doctrines of the sect. In this leaflet he also gave expression to certain strictures on other members of the caste, apparently to show the inconsistency of their attitude towards moral delinquency. This was regarded by a majority of the caste-people as implying a reflection on them, and they decided on holding a meeting of the *Panchayat* to consider the matter in relation to the plaintiff and his brother Bhagwan Das. The meeting was accordingly held on the 19th June, 1910; whether it was convened in accordance with the rules of the *Panchayat*, and whether plaintiff had notice of the meeting will be discussed shortly. The sitting of the *Panchayat* is said to have lasted from eight in the evening until next morning; so the

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debate must have been prolonged, and it may fairly be presumed that persons interested in the proceedings had ample opportunity to put in an appearance. Finally, as the plaintiff was in Calcutta and could not attend, and his brother Bhagwan Das did not or would not do so, the *Panchayat* passed a resolution, the publication of which forms the libel charged against the defendant in this action.

The resolution is in these terms :—

"It was settled by the '*panches*' that since B. Gobind Das and B. Bhagwan Das publicly circulated among the '*bradris*,' and the non-'*bradris*' a pamphlet about the '*bradri*' against the practices of the '*bradri*' and did not attend the '*Panchayat*' on being called to do so, these facts show that these gentlemen circulated the pamphlet simply to disgrace the '*bradri*,' and their not signing the '*chittha*' shows that their views are against the '*Panchayat*'; therefore, it is ordered that until B. Gobind Das and B. Bhagwan Das clear themselves, the family of B. Madho Das be '*baratao-bund*.'"

In the plaint the order recorded by the defendant is given more briefly. Whether the whole resolution or only the substance, as given in the plaint was communicated, the kernel of the publication was the decision to suspend social relations with the plaintiff. The communication was made by the defendant Bishmabhar Das in his capacity of *Chowdhri*, or chairman, of the *Purbia Panchayat* to the 'Western' section, who were, it is not disputed, interested in the result of the proceedings, and to other members of the caste in Benares, Mirzapore, and Chunar. The plaintiff on his return from Calcutta sent a registered letter to the defendant asking for particulars regarding the resolution and the facts on which it purported to be based. This letter was submitted to a smaller gathering of the community called a *baithak*, which apparently deals with minor matters affecting the caste; and it was decided to give no reply.

On the 24th August, 1910, the plaintiff brought the present suit. The main allegations on which the action is based are that the meeting of the *Panchayat* at which the resolution was adopted was not held in "good faith;" that it was composed of defendant's friends, "who were under his influence," and in effect it was a sham meeting; that no opportunity was given to him "to get up a defence;" and that in sending the resolution to the *Chowdhri* of the *Pachhain* section and the caste people generally the defendant was actuated by malice and ill-will. The plaintiff further alleged that by this act of the defendant, which virtually declares him to be an "outcaste," he has been disgraced and humiliated in the eyes of the members of the caste as well as the public at large and prejudicially affected in

his religious and communal rights and that he has also suffered mentally ; and he claimed 11,000 rupees as damages for the injury caused to him.

The defendant joined issue on all the material allegations ; he alleged that the meeting was regularly held, that the proceedings were *bona fide*, that due notice in accordance with the rules of the *Panchayat* was given to the plaintiff and the other members of his family ; he further pleaded privilege, alleging that in sending a copy of the resolution to the *Pachhain Panchayat* and others he acted in discharge of his duty ; and he denied that his action was the outcome of malice or ill-will.

The Subordinate Judge held that a meeting of the *Panchayat* was in fact held on the 19th June, 1919, and that the defendant was "as much liable for the resolution passed at that meeting as any other member" of the *Panchayat*. He held further that the conduct of the defendant (in publishing the resolution) was not privileged, inasmuch as "no notice of the meeting was given to the plaintiff, nor was he told with what offence he was charged. The defendant, therefore, has done an act which constitutes malicious defamation of the plaintiff." In another part of his judgment he says as follows :—

"It was the duty of the *Chowdhri* to publish the resolution complained of, and there is no malice in such publication. The legal malice consisted in not giving opportunity to the plaintiff to defend himself, and in passing that order behind his back. The publication of the order cannot be called malicious."

Their Lordships have referred to these findings of the trial Judge, as they form the sheet-anchor of the plaintiff's case on this appeal.

Proceeding on these grounds, and after an elaborate exposition of the Hindu doctrines relating to the lawfulness of sea voyages, he made a decree in favour of the plaintiff, awarding him a small sum as damages, as he considered he had merely a sentimental cause of action.

The defendant appealed to the High Court of Allahabad, which reversed the decree of the Subordinate Judge and dismissed the action, holding that the communication made by the defendant was privileged, and that there was no evidence of express malice.

On the present appeal, which is by the plaintiff to His Majesty in Council, the arguments have travelled over a rather wide area. In their Lordships' opinion, however, upon the facts proved or admitted in the case, the only points for determination are those on

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which the High Court proceeded, namely, whether the occasion on which the communication was made by the defendant to the *Chowdhri* of the *Pachhain* section and members of the caste interested in the matter was privileged; and if it was, whether he has forfeited it by reason of the fact that in making the communication he was actuated by what is called in law express malice. The onus of establishing this fact that his conduct was the outcome of some improper motive or private spite rests on the plaintiff.

The principles relating to both these questions are well settled and require no examination. Their Lordships need only refer to *Toogood v. Spyring* (1), in which Baron Parke enunciated the rule as to privilege which has been accepted in subsequent cases as furnishing the guiding principle on the subject; and to the case of the *London Association for the Protection of Trade v. Greenlands (Limited)* (2), and the recent case of *Adams v. Ward* (3), in the House of Lords, not yet reported.

The allegation of the plaintiff that the meeting at which the resolution was passed was not a *bona fide* meeting of the *Panchayat* has been clearly disproved; the High Court has expressly found that the *Panchayat* was regularly convened, and that the proceedings were in conformity with its rules, and there is nothing in the Subordinate Judge's judgment to suggest or support a contrary view. The defendant, it is proved, is one of the two *Chowdhris* of the *Panchayat*. Their Lordships gather that he is the principal *Chowdhri*; anyhow, it is his duty to give effect to the decisions of the *Panchayat*, and to communicate the result of its proceedings to parties interested in the same. Along with the general body of the caste, the *Pachhain* section was interested in the decision of the *Purbia Panchayat* as it might seriously affect their own attitude with regard to the controversy. The resolution suspends provisionally social relations of the caste-people with the plaintiff and his family. The defendant denies that this amounts to "outcasting" the plaintiff; but assuming that it conveys the innuendo he charges, their Lordships are clearly of opinion that the defendant acted in discharge of the duty imposed on him in making the communication to the *Chowdhri* of the other section, and to the caste-people generally, and that the occasion was privileged.

The plaintiff's case, both in his plaint and on the evidence, was that the action of the defendant was the outcome of private spite. Again, the High Court has found that the defendant acted in good

(1) (1834) 1 C. M. &amp; R. 181.

(2) (1916) L. R. 2 A. C. 15.

(3) Not reported.

faith in the execution of his duty, and that it was not shown that he was "actuated by ill-will or ulterior or improper motive," nor does the Subordinate Judge hold the contrary. The trial Judge inferred what he calls "legal malice" from the failure of the defendant to give a sufficient personal notice to the plaintiff. Their Lordships do not understand what the learned Judge means by legal malice. To defeat or rebut privilege, the law does not recognise anything short of actual or express malice in the publication of the matter which is charged to be libellous. They find no ground for supposing there was any duty imposed on the defendant beyond properly and duly giving effect to the rules of the *Panchayat*; the inference of "legal" malice from his not doing something more seems to their Lordships quite unwarranted.

But it has been contended that the absence of proper notice to enable the plaintiff to attend the meeting and exculpate himself, being contrary to the principles of natural justice, vitiates the whole proceeding and affects the *bona fides* of the defendant's action. This contention seems to confuse two distinct considerations. Whatever may be the effect of the absence of such a notice with regard to the adjudication of the matter, unless it can be shown that the defendant was bound to examine into the regularity and correctness of the *Panchayat's* decision before issuing a copy of the resolution to parties interested in the question, it would be absurd to say that the privilege is affected or rebutted by want of notice.

It is clear, however, that a notice in accordance with the rules and practice of the *Panchayat* was given in fact to the plaintiff's family, and at the family residence standing in the *Panchayat* register. He no doubt was absent in Calcutta, but the question that was to be debated affected all the members of the family, and any one of them could have attended, if not to answer the charge, at least to ask for an adjournment.

The finding of the Subordinate Judge on this point is distinct. He says:—

"The defendant gave notice to the plaintiff in the usual manner, namely, by sending the barber to the Kothi house in the city. It is not denied that the barber gave notice of the meeting to the plaintiff's *gumashta* Debi Parsaad. For all ordinary *Panchayat* purposes such notice would have been enough. No notice ever was given by the plaintiff to the defendant that the four brothers are separated, and that in the *Panchayat* register, instead of one name, four names should be entered, and that in future all notices should be sent to

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the different residential houses of the plaintiff and his brothers, and not to their joint house in the city."

Their Lordships are of opinion that this appeal fails; they will accordingly humbly advise His Majesty that it should be dismissed with costs.

*Douglas Grant* :—Solicitor for the Appellant.

*T. L. Wilson & Co.* :—Solicitors for the Respondent.

J. M. P.

*Appeal dismissed.*

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March 9, 13, 14, 15,  
16, 19, 20 & 22.  
May, 3.

PRESENT : *Lord Buckmaster, Lord Parker of Waddington, Lord Parmoor, Mr. Ameer Ali and Sir Walter Phillimore, Bart.*

KANDUKURI BALASURYA PRASADHA ROW AND ANOTHER

*v.*

THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

[ ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT MADRAS. ]

*Water Cess—Irrigation—Permanent settlement—Extent of zemindar's or inamdar's right of user under engagements with Government—River or stream belonging to Government—"Free of separate Charge"—Madras Act VII of 1865, SS. 1, 2—"Standing and flowing water"—Madras Act III of 1905, S. 2,—Inams.*

The Government claimed under Madras Act VII of 1865 to levy water cess upon permanently settled lands (zeralti and inam) in so far as the user of Government water for irrigation exceeded the user at the time of the permanent settlement, whether in respect of the area irrigated or in respect of the fact that two crops were raised instead of one :

*Held* (agreeing with the Courts below) that the effect of the permanent settlement was to vest the then existing irrigation channels in the zemindars through or within whose zemindaris the same respectively passed or were situate.

*Held, also*, (in this differing from the Courts below) that the right of user from such irrigation channels which passed by the permanent settlement could be measured only by the physical conditions existing at that time and not by the extent to which the water was in fact used : and that assuming the river with which the channels connected belonged to the Government, the zemindar's right of taking water from it was limited only by the size of the channels and the

nature of the sluices and works by which water was diverted from the river into the channels. The Government could not complain if the amount of water taken were within this limit. Once the water was lawfully taken into the channels, Government had nothing further to do with the matter.

Whether or not there are other cases which the first proviso to S. 1. of Madras Act VII of 1865 was intended to meet, it at least covers the case of engagements with the Government arising out of the permanent settlement. If by virtue of such settlement a zemindar is entitled to take and use water from any such source of supply as mentioned in the Cess Act and this right is part of or appurtenant to the property in respect of which he pays a single *jumma* or *peishkush*, no cess can be levied under the Act in respect of the water which he is so entitled to take and use.

*Seemle*, that the second proviso is intended similarly to safeguard the ralyats' rights under the periodical temporary settlements. *Kandukuri v. The Secretary of State for India* (1) reversed.

Inams are Government grants subject to quit rents, and in some instances to services. They were not assessed for land revenue at the date of the permanent settlement.

Three consolidated appeals from a decree of the Madras High Court, confirming one and modifying two decrees of the District Judge of Ganjam.

The facts of the case are sufficiently set forth in their Lordships' judgment. The suit out of which the appeals arose were, as there stated, brought by the appellants to recover monies claimed by the respondent as water cess and paid by their predecessor under protest. The suits were dismissed by the first Court, whose decision was confirmed (with modifications in two cases) by the High Court. The judgment of the latter Court, which contains a fuller statement of the facts, is reported: See *Kandukuri v. The Secretary of Estate for India* (1). The appeal of *Ambalavana Pandara Sannadhi v. The Secretary of State for India in Council* (2) from the judgment of Madras High Court was also decided on the 20th June 1917 in accordance with the above judgment.

*Mr. Upjohn, K. C.*, and *Sir W. Garth*, for the Appellants: The general law in India as to rights in flowing water is the same as that in England: *Rameshur Pershad Narain Singh v. Koonj Behari Pattuk* (3); *Kali Kishen Tagore v. Jodoo Lal Mullick* (4); *Perumal v. Ramasami* (5); *Deevi Pershad Singh v. Joynath Singh* (6); Indian

(1) (1910) I. L. R. 34 Mad. 295. (2) (1910) I. L. R. 34 Mad. 366.

(3) (1878) L. R. 6 I. A. 33; I. L. R. 4 Calc. 633.

(4) (1879) L. R. 6 I. A. 190.

(5) (1887) I. L. R. 11 Mad. 16.

(6) (1897) L. R. 24 I. A. 60; I. L. R. 24 Calc. 865.

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Easement Act (V of 1882), S. 7, illustrations (f) & (j). The duty of the Government to regulate irrigation does not entitle the Government to interfere with the water rights of private individuals: *Ponnuswami Tevar v. Collector of Madura* (1); *Kristna Ayyan v. Vencatachella Mudali* (2); *First Assistant Collector of Nasik v. Shamji Dasrath Patil* (3); *Ramchandra v. Narayanasami* (4); *Sankaravadivelu Pillai v. Secretary of State for India* (5); *Ambalavana Pandara v. Secretary of State for India* (6); The argument for the appellants falls under three heads. *First*, the Act of 1865 has no application in the present case. It applies only when the Government has constructed a complete work of irrigation for the public benefit. This appears from the preamble, and is supported by S. 1 (b). The channels were not constructed by the Government, and any expenditure by the Government after their purchase of the three zamindaris was for the benefit of their own estates. *Secondly*, the river Vamsadhara is not "a river belonging to the Government." Flowing water cannot be the subject of property apart from legislation. The High Court misconstrued Madras Act III of 1905, S. 2, sub-s. 1. Upon its true construction that sub-section refers only to the beds of rivers and not to flowing water itself; the Act is declaratory as to land only. The channels do not belong to the Government within the meaning of the Act of 1865. *Thirdly*, the appellants are within the first proviso to S. 1. of the Act of 1865 as amended in 1900. The four zamindaris were settled with the channels upon them, the Government reserving no interest. They are to be implied from the *sanads* grants of rights to use the water to extend the wet cultivation, or for any purpose of the land, subject to the rights of other owners: *Watts v. Kelson* (7); *Secretary of State for India v. Perumal Pillai* (8); *Chidambara Rao v. Secretary of State for India* (9); (Reference was also made to *Mudaliar v. Secretary of State for India* (10); *Lutchmee Doss v. Secretary of State for India* (11); *Secretary of State for India v. Swami* (12); *Secretary of State for India v. Ambalavana* (13); and *Madras Regulation XXV of 1802*.

*P. O. Lawrence, K. C., Sir Erle Richards, K. C., and Kenworthy Brown*, for the Respondent: The Vamsadhara is a river "belonging

(1) (1869) 5 Mad. H. C. R. 6.

(2) (1872) 7 Mad. H. C. R. 63.

(3) (1878) I. L. R. 7 Bom. 209.

(4) (1892) I. L. R. 16 Mad. 333.

(5) (1904) I. L. R. 28 Mad. 7.

(6) (1905) I. L. R. 28 Mad. 539.

(7) (1870) L. R. 6 Ch. 166 (175)

(8) (1900) I. L. R. 24 Mad. 279.

(9) (1902) I. L. R. 26 Mad. 66.

(10) (1904) 14 M. L. J. 350.

(11) (1909) I. L. R. 32 Mad. 456.

(12) (1910) I. L. R. 34 Mad. 21.

(13) (1910) I. L. R. 34 Mad. 366.

- to the Government." In the Madras Presidency all rivers and streams including the flowing water, vest in the Government :
- Madras Act III of 1905, section 2, Sub-section 1. The authorities establish that that ownership is subject to, but is not taken away by, (a) the rights of raiyats, (b) natural rights of riparian owners, (c) acquired rights of easements : *Ponnuswami Tevar v. Collector of Madura* (1), *Fisher v. Secretary of State for India* (2). In any case, the ownership of flowing water cannot be shown to be in anybody but the Government, and therefore it vests in them under the above Act. The channels were made by and belong to Government. But the water coming from a river belongs to Government, it is not material if the contrary is the case.° If the ownership of the bed is the test, the Government owned the bed where three of the four sluices were constructed. The appellants must show not only that the *sanad* gave them a right to use the water, but that it involved an engagement that they should not be charged with cess. Assuming that engagement is involved, it is limited to the extent of the user at the date of the *sanad* : *Secretary of State for India v. Janakiramayya* (3). The cess is not an addition to the *peishcush*, but is a charge or tax of a different kind, and is in respect of advantages newly enjoyed. Between the settlements the zamindars were in the same position as raiyats, who were made liable to the cess. There were concurrent findings that the irrigation by the plaintiff exceeded that customary at the date of the settlement. On the engagement question reference was also made to *Maharajah Jagadindra Nath Roy v. Secretary of State for India* (4) ; *Secretary of State for India v. Perumal Pillai* (5) and *Secretary of State for India v. Maharajah of Bobbili* (6) ; The Fifth Report, Appendix 18 ; Instructions to Collectors No. 17 ;
  - Madras Act VII of 1865, section 11 ; Madras Rent Acts ; Board of Revenue Standing Orders (1913), Vol. 1, chapter 1, Orders 4, 5, chapter 2, Order 64, and Vol. 2, Appendix 1 ; BadenPowell's Land Systems of British India (1892 edition), Vol. 3, pages 6, 7, 17, 128, 198).

*Upjohn K. C.*, replied.

The judgment of their Lordships was delivered by

**Lord Parker of Waddington** :—These are consolidated appeals from a decree of the High Court of Madras, dated the 9th September, 1910, and made in three actions, in each of which

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|-------------------------------------------------------|----------------------------------|
| (1) (1869) 5 Mad. H. C. R. 6.                         | (2) (1909) I. L. R. 32 Mad. 141. |
| (3) (1913) I. L. R. 37 Mad. 322.                      |                                  |
| (4) (1902) L. R. 30 I. A. 44 ; I. L. R. 30 Calc. 291. |                                  |
| (5) (1900) I. L. R. 24 Mad. 279.                      | (6) (1915) 30 M. L. J. 163.      |

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Kandukuri Maha Lakshammamma (who has since died and is now represented by the appellants) was plaintiff and the Secretary of State for India was defendant. The plaintiff sought in each action to recover from the Secretary of State monies paid under protest in respect of water cesses which the Government of India had levied under the Madras Act No. VII of 1865, as amended by the Act No. V. of 1900. The point to be determined was the right of the Government to levy these cesses. The cess the subject-matter of the first action was levied in respect of water used for the second crop on zeraiti lands, part of the estates of Urlam and Devadi, of which the plaintiff was owner. Devadi was originally part of Urlam, and is hereinafter included in the expression "the Urlam Estate" or "the Urlam Zemindari." The cess the subject of the second action was levied in respect of water used for (1) the first crop on so much of the irrigated zeraiti lands belonging to the Urlam estate as the Government alleged to be in excess of the area so irrigated at the time of the permanent settlement; (2) the first crop on so much of certain inam lands situate within the Urlam estate, and of which the plaintiff was the inamdar, as the Government alleged to be in excess of the *manul* or customary wet at the dates when such inam lands were respectively originally granted or subsequently settled; (3) the second crop on the whole of such inam lands. The cess the subject of the third action was levied in respect of water used both on zeraiti and inam lands for all the purposes above mentioned with respect to the cess the subject of the second action. It may be mentioned that the plaintiff succeeded in the High Court on the issue as to the Government's right to levy a cess in respect of water used for the second crop on all the inam lands except those situate in the village of Venkatapuram. The Government has not appealed to His Majesty in Council. It would seem therefore that the questions their Lordships have to decide are the following: *First*: Is the Government entitled under the Act to levy a cess for water used for the second crop on zeraiti lands parcel of the Urlam estate? *Second*: The same question as to inam lands in the village of Venkatapuram. *Third*: Is the Government entitled under the Act to levy a cess for water used for the first crop on so much of the zeraiti lands parcel of the Urlam estate as may be in excess of the area of such lands irrigated at the time of the permanent settlement? *Fourth*: Is the Government entitled under the Act to levy a cess for water used for the first crop on so much of the inam lands within the Urlam Estate as is in excess of the area of such lands irrigated at the respective dates when these inam lands were originally granted or subsequently

settled? In order to answer these questions their Lordships must, in the first instance, examine the provisions of the Act itself.

The Act is intituled "An Act to enable the Government to. Levy a Separate Cess for the use of Water supplied for Irrigation Purposes in certain Cases." It recites that in several districts of the Madras Presidency large expenditure out of Government funds has been and is still being incurred in the construction and improvement of works of irrigation and drainage to the great advantage of the country and of proprietors and tenants of land, and that it is right and proper that a fit return should in all cases alike be made to Government on account of the increased profits derivable from lands irrigated by such works. By section 1 of the Act as amended by the Madras Act, No. V of 1900, it is provided (*inter alia*) that whenever water is supplied or used for purposes of irrigation from any river, stream, channel, tank, or work belonging to or constructed by Government, it shall be lawful for the Government to levy at pleasure on the land so irrigated a separate cess for such water, and the Government may prescribe the rules under which, and the rates at which, such water cess as aforesaid shall be levied, and alter and amend the same from time to time. Then follow two provisos, the first for the protection of zemindars, inamdars, or any other description of landholder not holding under ryotwari settlement; and the second, for the protection of landholders under ryotwari settlement. Under the first proviso, where a zemindar, inamdar, or other landholder not holding under ryotwari settlement is, by virtue of engagements with the Government entitled to irrigation free of separate charge, no cess under the Act is to be imposed for water supplied to the extent of this right and no more. Under the second proviso, no cess is to be levied under the Act in respect of land held under ryotwari settlement which is classified and assessed as wet unless the same be irrigated by using, without authority, water from any source therein-before mentioned and such source is different from, or in addition to, that which has been assigned by the revenue authorities or adjudged by a competent civil Court as the source of irrigation of such land.

It cannot be denied that, with regard to the true meaning and construction of this Act, various difficulties arise. In the first place, it might have been expected from the recitals that the cess which the Government is authorised to levy would have been confined to a cess in the case of land irrigated from works constructed or improved by Government and would have been in some way proportional to the extra profits derivable by reason of such irrigation. But this does

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not seem to be the effect of the first section. The amount of the cess is discretionary and, as a matter of fact, it is levied on the basis of the area irrigated, irrespective of actual or possible profits. Moreover, it appears to be leviable whether the Government has or has not spent money in constructing or improving the source from which the water is supplied. If for example, a riparian owner irrigates his land with water derived from a river or stream of which it can be truly said that it is a river or stream belonging to the Government, a cess would appear to be leviable even though the Government had never spent a single rupee in improving the source of supply. If, in order to avoid this result, reliance were placed on the first proviso, the question would arise whether it were possible to imply some engagement with the Government arising out of the natural or prescriptive right of the riparian owner.

In the next place, it is by no means easy to say what is meant by a river or stream "belonging to the Government." The same expression in an Act of the United Kingdom would probably connote a Government ownership of the bed or the banks of the river; but it is quite possible that the law of the Madras Presidency recognises some proprietary right on the part of Government in the water flowing in rivers and streams. The law of the Madras Presidency as to rivers and streams certainly differs in some respects from English-law [*Fischer v. Secretary of State for India*, (1).] Further, the Madras Act, No. III, of 1905, appears to enact that (*inter alia*) all standing and flowing water, not the property of private individuals, is the property of Government, but subject to the natural and easement rights of other land-holders. If this section be relied on, it is a nice problem whether a riparian owner, who is exercising his natural or prescriptive right of taking water from a natural stream for purposes of irrigation, is taking water from a stream belonging to the Government within the meaning of the Cess Act? If he is, the natural and prescriptive rights of riparian owners are seriously diminished by the Act and, where the Government have not expended money in improving the natural stream, apparently without any sort of *quid pro quo*.

Lastly, it is by no means easy to decide as to the class of case which the first proviso is intended to meet. Their Lordships cannot accept the contention that the proviso applies only where there is an express contract that the supply to which the person claiming the protection of the proviso is entitled shall be free from anything in the nature of a future tax. It is enough, in their Lordships' opinion, that the person relying on the proviso shall show an engagement

between the Government and himself or his predecessors in title by virtue of which he is, in fact, entitled to water for irrigation (1) from the source from which he is actually irrigating his lands; (2) to the amount of water actually used for such irrigation; and (3) without being subject to a "separate charge" for such irrigation. But there is a difficulty in arriving at what is the meaning of the expression "free of separate charge." A provision that the person relying on the proviso must prove that he is already being charged for the supply would be intelligible, for in that case by the imposition of a cess, he would be charged twice for the same thing. But this is not what he has to prove. Indeed, he has to prove the contrary. He must prove either that he is not charged already for the supply, or that the charge, if any, is not a "separate charge."

Their Lordships think that the real object of the proviso may be found in the following considerations: The cess under the Act is leviable on the land which is irrigated. It is therefore in the nature of a land tax, and by section 2 is recoverable in the same manner as arrears of land revenue. Now the permanent land settlement in the Madras Presidency (as in the Presidency of Bengal) proceeded on the footing that, whatever may have been the interest of the zemindars and other landholders prior to the British occupation, the Government would grant to them and their heirs "a permanent property in their land for all time to come, and would fix for ever a moderate assessment of public revenue on such lands the amount of which should never be liable to be increased under any circumstances." (See Section 1 of Madras Regulations No. XXV of 1802.) The Government, therefore, came under an obligation not to raise the jumma, or, as it is sometimes called, the peishcush, fixed at the permanent settlement in respect of the lands then granted. Under these circumstances the Government could not impose a cess for the use of water the right to use which was appurtenant to the land in respect of which the jumma was payable without in fact, if not in name, increasing the amount of such jumma, and thus committing a breach of the obligation undertaken at the time of the permanent settlement. If the right to use the water was paid for separately the case would be different. The existence of a separate charge would show that no payment for the use of the water was included in the jumma, and the imposition of a water cess, though it might increase the separate charge would not increase the jumma. Its imposition would not be a breach of the Government's obligation.

That the object of the first proviso was to safeguard the obligation not to increase the jumma is borne out by a consideration of the

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second proviso. The incidents of ryotwari tenure are governed by custom, and include a right to receive from the owner of the soil (whether the Government or a private individual) a supply of water sufficient for the irrigation of the *mamul* wet lands comprised in each holding. The owner of the soil is, on his part, entitled to his customary share in the actual produce. It has, however, long been the practice on Government estates to make periodical settlements with the ryots whereby the Government's share in the produce is commuted for a fixed annual payment, in assessing which the wet lands are separately classified. The annual payment is incapable of increase during the period for which the settlement is made. It is paid (*inter alia*) for the ryot's right to water for irrigating his *mamul* wet lands, and would be increased if a new cess were imposed for this supply. The second proviso seems to be intended to provide against this result.

Their Lordships therefore conclude that whether or not there are other possible cases which the first proviso was intended to meet, it at least covers the case of engagements with the Government arising out of the permanent settlement. If by virtue of such settlement a zemindar is entitled to take and use water from any such source of supply as mentioned in the Cess Act, and this right is part of or appurtenant to the property in respect of which he pays a single jumma or peishcush, no cess can be levied under the Act in respect of the water which he is so entitled to take and use.

The appellants claim the benefit of the first proviso, relying mainly on the engagement with the Government constituted by the permanent settlement of the Urlam estate, but as to the inam lands in some degree also on engagements arising out of the inam grants or subsequent inam settlements. Obviously if their claim be well-founded the appeal must succeed on this ground alone, and it will be unnecessary for their Lordships to deal with the other questions which have been argued. Their Lordships therefore propose to consider in the first instance whether, and to what extent, the appellants are within the first proviso. That they are to some extent within the proviso was admitted in the Courts below, and was not really contested before their Lordships' Board. The respondent's contention was really this: The appellants, he said, may well be entitled without separate charge to certain water rights under the permanent settlement or in respect to inam lands under the inam grants or subsequent inam settlements, but those rights must in all cases be limited by the *mamul* prevailing when the particular settlement or grant relied on was made. The *mamul* did not extend to a

second crop on any of the zeraiti lands in the Urlam estate or to the inam lands in the village of Venkatapuram, nor did it extend to any wet land which was not *mamul* wet at the date of the settlement or grant on which reliance is placed. The Government has not charged cess for any water taken or used in accordance with the *mamul*. If they have done so they will refund the amount so charged ; but they claim the right to charge cess for water taken in excess of the *mamul* whether for the second crop on *mamul* wet land or for any crop on land in excess of the *mamul* wet. This contention depends for its validity on the true effect of the particular settlement or grant upon which reliance is placed, and the true effect of such settlement or grant depends upon its terms taken in connection with the circumstances existing when it was made. Their Lordships will first consider the effect of the permanent settlement of the zemindari or estate of Urlam. They will postpone for the present all questions as to the inams.

The Urlam estate had no separate existence prior to the permanent settlement. Till then it was part of a larger district consisting of (1) haveli lands and (2) lands belonging to a religious community of Brahmins known as the Agraharam, such last-mentioned lands being held under inam grants. This district was bounded in part by the river Vamsadhara, and some time prior to the permanent settlement extensive works had been carried out for the purpose of supplying the district with water from the river. These works included four main channels known as Jalmour, Polaki, Lukulam, and Mobagam. The first three appear to have been cut by one Ramanadhanulu, a member of the Agraharam, who was also a renter under Government of the whole or the greater portion of the haveli lands within the district. The origin of the Mobagam channel is lost in obscurity. Each channel derived its water by means of weirs and sluices from the river Vamsadhara, and the water was distributed throughout the district by means of branch channels and subsidiary channels ending in many instances in village tanks or reservoirs. The prosperity of the district depended to a great extent on the supply of water thus obtained.

In 1802 the Government proceeded to carve out of this district four estates or zemindaris, subsequently known as Jalmour, Nagarakatakam, Urlam, and Polaki, and to assess the permanent land revenue or jumma to be paid for each estate. Having assessed the permanent jumma the Government in July 1803 caused these four estates or zemindaris to be put up for public auction. At the auction all four estates were sold. It appears that in the advertisement

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announcing the sale particular attention was called to the fact that the village tanks or reservoirs had been repaired or improved for the benefit of purchasers, and particular stress laid on the benefit which the country would derive from the improvement of the properties offered for sale. In due course after the sale each purchaser obtained a sanad, but none of these sanads is now forthcoming. The corresponding kabulyat in the case of the Urlam estate is, however, in evidence. It refers to the Urlam sanad, the terms of which must have corresponded in all material particulars with those of the kabulyat. Their Lordships see no reason to suppose that the other sanads were not framed on the same lines.

The Urlam kabulyat does not mention any water rights. It does not even refer to the existence of main or branch or subsidiary channels or of the tanks or reservoirs in the several villages. It mentions the advantages likely to accrue to the zemindār and his people by the public revenue being put on a permanent foundation, and it refers to the jumma payable for the zemindari as a permanent annual tax, of which no increase can be ever made, whatever changes or improvements the interests or pleasure of the zemindar may lead him to introduce in his zemindari. It contains also an agreement by the zemindar to enter into engagements with his ryots in manner provided by section 14 of the Madras Regulation XXV of 1802, and to encourage such ryots to improve and extend the cultivation of the land. Subject to his observing the conditions of the kabulyat, the zemindar is authorised to hold the zemindari in perpetuity for himself and his heirs.

Their Lordships regret that they have not been supplied with a map or plan showing the boundaries of the four zemindaris, the subject of the auction sale, their position with regard to each other, and the extent to which the four main channels with their numerous branches or subsidiary channels lay within the boundaries of each estate. It appears, however, to be common ground that the four zemindaris together comprised all the haveli lands within the district, including those contiguous to the river Vamsadhara, together with the head sluices of the four channels, and, if the principles of English law governing the grant of land bounded by a stream or river be applicable in the Madras Presidency, they comprised also the river bed *usque ad medium filum* and the weirs by which water was diverted from the river into these main channels.

Three of the four zemindaris, namely, Jalmour, Nagarakatakam, and Urlam were sold in 1809-10 in order to raise arrears of land revenue. Two of them, namely, Jalmour and Nagarakatakam were

bought by the Government, and thenceforward became Government land subject to ryotwari tenure. The third, namely, Urlam, was bought at the same time by the plaintiff's predecessor in title. The sluice gates of the Mobagam channel were admittedly in the Urlam zemindari. The sluice gates of the Polaki channel were originally in Urlam, but appear to have been removed about 1824 to the Government village of Parlam, which would thus seem to have been within Jalmour or Nagarakatakam, for the Government did not acquire the Polaki zemindari till 1850. The sluice gates of the Jalmour channel were admittedly in the Jalmour zemindari; those of Lukulam are now admittedly on Government lands, but it is impossible to determine on the evidence in which zemindari they were comprised at the permanent settlement. They were certainly not comprised in Urlam.

The Jalmour main channel does not pass through any village in the Urlam zemindari. From it, however, some 130 acres of Urlam derive their water supply either by regulators in the main or branch channels, or by subsidiary channels through the estate, ending in one instance at least in a village tank. The Jalmour channel also now irrigates some 6,000 acres of Government land and some 1,100 acres belonging to the Agraharam. The Lukulam, Polaki, and Mobagam main channels all pass for considerable distances through the Urlam zemindari. Lukulam now supplies water to some 1,000 acres of Urlam land, some 500 acres of Government land, and some 2,500 acres belonging to the Agraharam. Polaki now supplies water to some 500 acres of Urlam, some 10,000 acres belonging to the Government, and some 1,500 acres belonging to the Agraharam. Mobagam now supplies water to some 3,500 acres of Urlam and some 500 acres of Government land. No doubt most, if not all, of the Government lands now supplied with water from these four channels were originally comprised within the zemindaris of Jalmour, Polaki, or Nagarakatakam. Moreover, though the area of land under each of the four channels may have increased since the permanent settlement, the general purpose which each channel served at the date of the permanent settlement can, in their Lordships' opinion, be properly inferred from the facts as they now exist.

Before proceeding further, it may be useful to summarise the conclusions arrived at by the Subordinate Judge and the High Court respectively. The Subordinate Judge held that the Vamsadhara river was not a river belonging to the Government within the meaning of the Cess Act. He held, however, that the head sluices of the Jalmour, Polaki, and Lukulam channels, with the initial portions of

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the channels themselves, belonged to Government, and must be looked on as the source of supply of water for the lower portions of the whole system of irrigation dependent upon them, and it was immaterial that parts of these main channels, or the branch or subsidiary channels leading therefrom, or the tanks or reservoirs in which some of the subsidiary channels ended, belonged to the owners of the villages through which they passed or in which they were situate. He held further that the rights of the owners of these villages were confined to using the water in the main branch and subsidiary channels and tanks or reservoirs for the purposes for which the same had been used at the time of the permanent settlement. They could not therefore, without the consent of the owner of the head sluices and the initial portions of the channels, lawfully use the water for a second crop unless second crops were within the then existing *mamul*, or extend wet cultivation beyond the area of the then *mamul* wet. On the other hand, he held, with regard to the Mobagam channel, that its head sluice and its initial portion did not belong to Government but to the owner of the Urlam zemindari, who had an unlimited right to the use of the water in the channel subject to the *mamul* rights of others. These findings appear to involve the following propositions:—

*First.*—The effect of the permanent settlement was to vest the head sluices of the four channels, the channels themselves, and all branch and subsidiary channels and tanks or reservoirs in the zemindars, through or within whose zemindaris the same respectively passed or were situate.

*Second.*—The zemindars who thus acquired the head sluices, with the initial portions of the channels themselves, became entitled to take into the channels from the river as much water as they chose, subject only to the rights of lower riparian owners on the river, and as little as they chose, subject to the obligation to send down each channel sufficient water to satisfy the *mamul* rights of persons entitled to water from the system supplied by each channel.

*Third.*—If the owner of the head sluice or the initial portion of any channel sent down more water than would satisfy those *mamul* rights, the proprietors of other parts of the channels or of the branch or subsidiary channels or the tanks or reservoirs were not entitled to make use of the surplus, or if they were entitled to make use of the surplus, were not so entitled by virtue of the sanads granted at the permanent settlement.

*Fourth.*—It was merely the accident of the Government having subsequently purchased the zemindaris of Jalmour, Polaki, and

Nagarakatakan which in any way brought their powers under the Cess Act into play. Had those zemindaris still existed in private ownership, each of these channels would have been precisely in the same position as the Mobagam channel.

The High Court disagreed with the Subordinate Judge on the question as to the Vamsadhara river. They held that it belonged to Government, and must, for the purposes of the Cess Act, be looked on as the source of supply of the whole system of irrigation dependent on the four main channels. They agreed with the Subordinate Judge that the effect of the permanent settlement was to vest the head sluices, the four channels, and all branch and subsidiary channels, and the tanks or reservoirs, in the zemindars, through or within whose zemindaris the same respectively passed or were situate. They held that the water rights of the owners of the head sluices and the initial portions of the channels, as of all other persons entitled to water from the system supplied by these channels, were confined to the *namul* at the date of the permanent settlement, and that the Government could therefore charge water cess in respect of water used in excess of the then *namul*, either for a second crop where no second crop had been customary, or for irrigating land in excess of the original wet area. These findings appear to involve the propositions (1) that the easements of taking water from the Vamsadhara conferred by the sanads were confined to taking sufficient water to satisfy the *namul* rights, and (2) that, if without objection from the Government, more water were taken, the proprietors of the various portions of the main channels, branch or subsidiary channels, or of the tanks or reservoirs, were not entitled to make use of the surplus, or if they were entitled to make use of the surplus, were not so entitled by virtue of the sanads granted at the permanent settlement.

In their Lordships' opinion, there can be no real doubt that the Courts below were right in holding that the effect of the permanent settlement was to vest the channels, with their head sluices and branch and subsidiary channels, and the tanks, or reservoirs, in the zemindars through or within whose zemindaris the same respectively passed or were situate. As pointed out by the High Court, this would be in full accordance with the policy enunciated in the well-known Fifth Report. Indeed, no reason can be suggested for implying in favour of the Government any reservation of this system of irrigation. It is not shown that the Government were retaining any of the land thereby irrigated. They were parting, or had parted, with (if not the whole), at any rate, the greater portion of such land. If they retained any, it would be enough to imply a reservation of

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water rights in respect of the land so retained. It is true that, on this footing, disputes were not unlikely to arise (indeed, they did arise) as to the relative rights of the several zemindars or their ryots. But the probability of such disputes is not sufficient reason for implying a reservation. They could not concern the Government, and were capable of settlement by arrangement, or through the medium of the Courts. On the other hand, the reservation of the main channels and other works would certainly have raised questions as to the Government's liability for repairs or otherwise. But, while agreeing in this respect with the conclusion of the Courts below, their Lordships do not think that such Courts attached sufficient importance to that conclusion. In their opinion, the fact that the ownership of the channels and works passed under the several sanads is of the utmost importance in ascertaining the water rights thereby conferred.

Assuming that the Vamsadhara river belongs to Government, the case may be looked on in this way. The owner of a river and of contiguous land through which passes a channel constructed for irrigation purposes and supplied with water from the river, grants the contiguous land together with the channel. Obviously some right or easement of taking water from the river must pass. The only question is as to the measure of this right. In their Lordships' opinion, the right must be measured by the physical conditions, such as the size of the channel, or the nature and extent of the sluices and weirs governing the amount of water which enters the channel, and not by the purposes for which the grantor or his tenants have been accustomed to use water from the channel prior to the date of the grant. The water in the channels may never have been used by the grantor or his tenants at all, but it would be absurd to hold on that account that no easement or right of taking water from the river passed by the grant. The case would have been very different if the contiguous land had been granted reserving the channel. In that case if any easement passed, it would be an easement in respect of which the channel and not the river was the servient tenement, and if no water had been or were being used by the grantor or his tenants, it may well be that there were no existing physical conditions by which the principle of continuous and apparent easements could be brought into play. In such a case no easement or right to use water from the channels would pass under the grant.

It follows from these considerations that the zemindar in whose estate the head sluices and initial portions of each of the four channels in question were situate obtained under his sanad the right to take water from the Vamsadhara (assuming it belonged to the

Government) limited only by the size of the channel and the nature of the sluices and works by which water was diverted from the river into the channel. The Government could not complain if the amount of water taken were within this limit. After the water was lawfully taken into the channel, the Government had nothing further to do with the matter ; the subsequent distribution and use depended on the rights *inter-se* of the zemindar and others entitled to take water from the system supplied by the channels in question.

It may be observed that the Government could not grant the zemindaris otherwise than subject to the customary rights of the ryot cultivators and the rights of all holders of inams under existing inam grants. The zemindars in whose favour the sanads were made took therefore subject to those rights. In other respects the rights *inter-se* of the several zemindars under their sanads would, in their Lordships' opinion, be analogous to the rights of upper and lower riparian owners on a natural stream. Each would be entitled to have the full supply taken into the main channels. Each would be entitled to make use of the water in any channel through his own lands or in tanks or reservoirs in villages within his estate, but in exercising this right each would be bound to have due regard to the existence not only of the rights of the ryots and inamdars in the lower portions of the irrigation system, but to the rights similar to his own of the other zemindars in whose estates any portion of the system was situate. Further, each zemindar might be entitled to take water from the channel or branch channel in the estate of the others if at the time of the settlement and on the principle of continuous and apparent easements circumstances pointed to the intention to create such a right. It follows that each zemindar could (subject as afore-said) legally authorise his ryots to use water to the use of which he was himself entitled for the growth of second crops on their holdings or for increasing the area of land within their boundary for the time being under wet cultivation. In taking advantage of such authorisation the ryots would be entitled to rely on the engagements with the Government arising out of the permanent settlement to the same extent as the zemindar himself. All these zemindari rights would moreover arise under and be dependent upon engagements with the Government embodied in the sanads granted at the permanent settlement, and payment for them would be included in the jummas.

Assuming, on the other hand, that the river Vamsadhara does not belong to the Government, the right of taking water from it into each of the four channels could not depend on any easement created by virtue of the permanent settlement. It would depend in part

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upon the natural rights of riparian owners and in part on prescriptive rights existing at the date of, and passing under, the sanads, or acquired since the sanads were granted. Moreover, in the case of these prescriptive rights, it would be the lands of the lower riparian owners and not the river itself which would constitute the servient tenement. The Government would have even less interest in the amount of water taken into the channels than if the river belonged to it and constituted the servient tenement. The rights *inter se*, however, of the grantees of the four zemindaris would be, for all practical purposes, the same. The rights of the proprietor of Urlam under his sanad could not in any case be affected by the subsequent purchase by the Government of the three other zemindaris.

The construction of the sanads in the way their Lordships construe them has the advantage of being in ample accord with the known policy and objects of the permanent settlement. The uncertainty as to the ownership of the soil and the liability to arbitrary and varying assessments to the land revenue had (to use the language of Regulation XXV of 1802) "obstructed the progress of agriculture, population, and wealth." The policy was to encourage such progress, and accordingly we find in the kabulyat of the Urlam estate (which is admittedly a common form kabulyat) an undertaking by the zemindar to encourage his ryots to extend and improve the cultivation of the land. The same point is emphasised in the advertisement for the sale at which the zemindaris were sold. In this part of India water is essential for improvements in agriculture. These facts coupled with the actual grant to the zemindars of the channels, branch channels, and works, constituting an extensive system of irrigation which must have been created for the benefit of the lands comprising the several zemindari estates, manifests, in their Lordships' opinion, an intention that the water therefrom should be used to the utmost extent for the purpose of improving the estates, and increasing the population or wealth of the district. On the construction of the sanads adopted by the High Court, water could not properly be used for any such purpose. Indeed, though the channels, branch channels and works constituting the irrigation system were included in the grants, no right to use such system passed at all. For the grants were necessarily subject to the existing rights of the ryots and inamdars, and according to the decision of the High Court it was only in respect of these rights that any water could be used from the system.

Both the Courts below appear to have arrived at the conclusion that the water rights which passed by the sanads were limited by the

*mamuls* at the permanent settlement for the following reasons: The assessment of the permanent jumma in the case of each zemindari was arrived at on the basis of the then actual produce of the land. An annual value was placed on this produce, and a proportion of the annual value was fixed as the jumma or peishcush. The water actually used in growing the annual produce thus comes within the assessment. The use of the water for other purposes was not assessed at all, and therefore does not pass by the sanad grants. In their Lordships' opinion, this process of reasoning is fallacious on two grounds: It does not follow that the assessors in fixing the proportion of the annual value which should constitute the jumma or peishcush did not take into full account the possibility of improving the cultivation of the lands, the subject of the grant, by means of the irrigation system comprised therein. The jumma or peishcush was in the case of each of the zemindaris in question admittedly high. Again, it does not follow that all which is not brought into account in fixing the jumma or peishcush is excluded from the grant. On this footing many things of great importance to the enjoyment of a zemindari would not pass by a zemindari grant, for example, waste land, farm buildings, tanks, or, in the present case, irrigation channels. As pointed out in the recent case of *Raja Ranjit Singh Bahadur v. Srimati Kali Dasi Debi and others* (1) (unreported at present), the property taken into account in arriving at the jumma is by no means necessarily the same as the property upon which the jumma is chargeable, and all that is chargeable with the jumma or peishcush is included in the grant.

There being no evidence whatever that more water is being taken from the river than would be justified by the sanads—construed as in their Lordships' opinion they ought to be construed—it follows that the appellants must succeed in respect of the zeraiti lands on which the cesses in dispute were levied. It remains to consider the case of the inam lands.

Inams are Government grants subject to quit-rents, and in some instances to services. They were not assessed for land revenue at the date of the permanent settlement. The inams now in question existed at the date of the permanent settlement, and the quit-rents payable in respect thereof were by the Urlam sanad made part of the assets of the Urlam estate. They are constantly referred to in the inam records as within the Urlam estate. They were sometime since acquired by the plaintiff or her predecessors. The appellants, therefore, are the inamdars as well as the persons entitled to the

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quit-rents under the Urlam sanad. The water for the use of which the cesses in dispute were levied was used by the zemindar on inams which belonged to him and were within his zemindari. The question is whether the zemindar was entitled so to use this water. In their Lordships' opinion, the answer to this question must be in the affirmative. The only persons who could complain of such use would be persons whose rights to take water from the irrigation system in question were interfered with by such user, and there appears to be no such person. If the cess were levied on the plaintiff as Urlam zemindar, he brings himself within the first proviso by virtue of the engagement with Government arising out of his zemindari sanad. If the cess were levied upon him as inamdar, he can rely on the same engagement to the same extent as could a tenant of zemindari land authorised by the zemindar to use the water. It is, therefore, in their Lordships' opinion, unnecessary to consider the terms of the original inam grants or the effect of any subsequent inam settlement. The appellants must succeed also as to the inam lands.

The result is that the appeal succeeds, both as to zeraiti and inam lands. The right thing will be to discharge the orders of the Subordinate Judge and the High Court, and to declare that the rights of the zemindar of Urlam under the Urlam sanad to irrigate the Urlam estate (including inams therein) from the Jalmour, Polaki, Lukulam, and Mobagam channels or their branches, is not limited by any *mamul*, and that such zemindar, not being subject to any separate charge for such irrigation, is within the protection of the first proviso to section 1 of the Cess Act No. VII of 1865, as amended by the Act No. V of 1900. The appellants will be entitled to recover the amounts paid under protest with interest at 6 per cent. per annum and their costs here and in the Courts below. Their Lordships will humbly advise His Majesty accordingly.

*Douglas Grant* :—Solicitor for the Appellant.

*Solicitor, India Office* :—Solicitor for the Respondent.

J. M. P.

*Appeals allowed.*

PRESENT: *Viscount Haldane, Lord Atkinson, Sir John Edge  
and Mr. Ameer Ali.*

JADU NATH SINGH AND ANOTHER

*v.*

THAKUR SITA RAMJI AND ANOTHER.

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April, 24.

[ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER  
OF OUDH.]

*Hindu Law—Gift to an idol—Reservation in favour of settlor's family—Whether  
it invalidates the gift or reduces it to a charge.*

The mere fact that a Hindu settlor, in settling property upon an idol, directs that members of his family should be the managers of the temple, and reserves a portion of the income of the settled properties for their remuneration, does not at all events if the income so reserved is moderate, invalidate the endowment either as a whole or to the extent of the income so reserved.

*Seemle*, that it might be otherwise if the income reserved were large.

*Sonatus Bysack v. Sreemutty Juggutsoondree Dossee* (1); and *Ashutosh Dutt v. Doorga Churn Chatterjee* (2) discussed.

Appeal from a decree of the Court of the Judicial Commissioner of Oudh, dated November 24, 1913, modifying a decree of the Additional Judge of Hardoi, dated October 25, 1911.

The appellants were the reversioners of Darshan Singh in whose family there was a custom excluding daughters from inheritance. On July 20, 1893, he executed the following deed of endowment:—

"I am Darshan Singh, son of Girand Singh, caste Thakur, resident of village Karhar, Pargana Param Nagar, District Farrukhabad.

"Whereas the zemindari property, groves and houses, as detailed below have all along been jointly owned and possessed by me and my own brother, Kanchan Singh; whereas to my sorrow my brother is dead and I alone am in possession of the properties and manage them; whereas my brother and I having constructed a temple in village Karhar, had dedicated it to Sita Ramji and it is known after the name of Sita Ramji; whereas we, both the brothers, had no male issue, we having taken into consideration the circumstances of the family executed a registered will on 5th June 1889; now that the circumstances of the family have become worse, I want to enforce in my life-time *mutatis mutandis* the same management which we the two brothers then did lay down after mutual consultation and

(1) (1859) 8 M. I. A. 66.

(2) (1879) L. R. 6 L. A. 182; I. L. R. 5 Calc. 438.



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wish that the same may be acted upon in my life-time. The circumstances of the family at present are that Kanchan Singh's wife is dead and only Musammat Jasoda, widow of Ram Ghulam, the daughter-in-law of the declarant, is alive. Musammat Janki, my widowed daughter, and the other daughter, Musammat Lilawati, who is also a widow and has a daughter, are alive. Musammat Newal Koer, daughter of my deceased brother, Kanchan Singh, also has up to this time no male issue. Wherefore in accordance with my former ideas and writings, mentioned above, I lay down the following arrangement for the expenses of the temple, and the maintenance and protection of the rights of the aforesaid members of the family.

"1. I dedicate my whole property, detailed below, to and in favour of the temple of Sita Ramji. I shall apply for mutation of names in favour of Sita Ramji and get mutation effected in its favour.

"2. I shall, during my life-time, manage and administer the estate of the temple.

"3. After me Musammat Jasoda, my daughter-in-law, will act as manager and administer like myself, and after her my daughters, Musammat Janki and Musammat Lilawati, and the daughter of my deceased brother, Musammat Newal Koer, shall jointly remain managers and administrators and shall live in my house and properly manage the estate.

"4. The dwelling house will remain reserved for the abode and comfort of the mutwalli and manager belonging to the family, who should occupy the same.

"5. After payment of Government revenue and the expenses of collection, half the net income of the estate shall be applied towards the performance of religious ceremonies and charities, the offering of food to the deity and the repairs of the temple.

"6. The remaining half shall go to the support of the managers (of the temple) belonging to the family.

"7. After Musammat Jasoda and the daughters, any issue born of those daughters would be the mutwalli and the manager of the endowment and the temple. If Musammat Newal Koer, who is still capable of bearing a male child, gives birth to a male child, he shall be the manager thereof like myself and not the daughters of the daughters.

"8. Half the net income shall be expended in a proper manner in the upkeep of the temple and an account of the same shall be kept by the manager, which the Government for the time being shall inspect and supervise.

"9. None of the managers or administrators shall have any power to alienate the house and the property endowed.

"10. If by the will of God none of the persons enumerated in Para. 3 remain, the Government for the time being shall act as the manager and administrator of the temple and the property endowed, and in that event the whole income of the property, after excluding the expenses of managing the estate, shall be expended exclusively for the purposes of the temple; and the expenses of the temple, as detailed above and the cost of feeding fakirs and indigent people, shall be defrayed in the manner the Government for the time being may deem fit.

"11. If, as mentioned above, there arise any difference among the daughters or their issue in respect of the management or administration of the estate, the Government for the time being shall appoint a manager (sarbarakar), who shall act in conformity with the directions above given.

"Wherefore this deed of endowment is executed in favour of the temple of Sita Ramji situated in village Karhar to serve as a sanad."

On the 17th November 1898 Darshan Singh died. His daughter-in-law (respondent No. 2) took possession as manager under the deed, and was still in possession when on November 15, 1910 appellants sued for possession on the ground that no valid endowment was created or intended to be created by the deed and that they were entitled to the property. The Subordinate Judge held, on the authority of *Sonatun Bysack v. Sreemutty Juggutsoondree Dossee* (1) that the alleged endowment did not constitute a complete gift to the idol, but that its effect was to create a charge for the benefit of the temple on half of the income; he gave plaintiffs a decree subject to such charge. On appeal, the Court of the Judicial Commissioner dismissed the suit altogether, holding (1) that the endowment was good, and (2) that the suit was barred by limitation.

*Sir W. Garth and H. N. Sen* for the Appellants: The question is whether the endowment passed the entire property to the idol. The deed purports to be a complete dedication, but that was not really Darshan's intention. What he wanted to avoid was the exclusion of his daughters by the collaterals. On the true construction of the deed all that is required is a charge in favour of the idol for so much as is given to the idol: *Sonatun Bysack v. Sreemutty Juggutsoondree Dossee* (1) and *Ashutosh Dutt v. Doorga Churn Chatterjee* (2).

This is all which the deed effects, and the rest of it is not

(1) (1859) 8 M. L. A. 66.

(2) (1879) L. R. 6 I. A. 182; L. L. R. 5 Calc. 438.

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operative. Darshan never treated the deed as divesting him of his rights : he lived 4 months after it, but never applied for mutation. Defendants were challenged to produce his accounts, but have not done so, because they would have shown that he dealt with the property after the deed just as he did before. The books would show if accounts were kept in Darshan's name or in the idol's. Darshan's object was that after providing for the idol, the whole income should be enjoyed by these ladies. Half the income is given for the use of the idol, but the other half is beneficially given to the ladies.

(*De Gruyther, K. C.* It is only about Rs. 30 per month.)

The case is exactly similar to cases where the Board has held that nothing but a charge was in fact created. Reference was made to *Brojosoonderi Debia v. Rani Lachmi Koonwaree* (1), and it was submitted that this was similar case, there being no real endowment, notwithstanding the dedication of the temple,\* for the idol was a family idol and the public had no right of access. Really the deed is a private arrangement to divide the course of inheritance.

*De Gruyther, K. C.*, and *Dube*, for the Respondents were not called on.

Their Lordships' judgment was delivered by

April, 24.

**Viscount Haldane** :—Their Lordships think this is a very plain case, and they propose to intimate at once the advice which they will tender to the Sovereign.

The whole question arises on the construction of a deed of endowment executed by one Darshan Singh on the 20th July, 1898. There had been a joint family, and he and his brother, the heads of the joint family, had made a joint will and the brother had died before him. Darshan Singh was desirous by this date of making a disposition of the property, which was now his as head of the joint family, which should be devoted to religious purposes, and he executed this deed and afterwards registered it, by registering, showing that it represented an intention which he desired to treat as carried into execution. The deed begins by saying that he dedicates his whole property to and in favour of the temple of Sita Ramji ; then he goes on to say that during his lifetime, he himself will manage and administer the estate of the temple ; after that, he provides that his daughter-in-law is to act as manager and administrator, and, after her, his own daughters, Musammat Janki and Musammat Lilawati, and a daughter of his deceased brother shall jointly remain managers and administrators, and shall live in his house and properly manage the estate. The deed proceeds : "The dwelling-house will remain

(1) (1873) 15 B. L. R. 176.

reserved for the abode and comfort of the *mutwalli* and manager belonging to the family, who should occupy the same." Then, after the payment of Government revenue and the expenses of collection, half the net income is to be applied towards the performance of religious ceremonies and charities, the offering of food to the deity, and the repairs of the temple. The remaining half is to go to the support of the managers of the temple belonging to the family, that is to say, of those who are members of the family. Then, after the daughter-in-law and the daughters, any issue born of those daughters would be the *mutwalli* and managers of the endowment and the temple. If the daughter of his deceased brother, who is still capable of bearing a male child, gives birth to a male child, he shall be the manager thereof like Darshan Singh himself, and, if not, the daughters of the daughters. Then, "Half the net income shall be expended in a proper manner in the upkeep of the temple, and an account of the same shall be kept by the manager, which the Government for the time being shall inspect and supervise." Then, "None of the managers or administrators shall have any power to alienate the house and the property endowed." Then, if none of the persons enumerated remain, the Government is to act as the manager and administrator of the temple and property endowed, and in that event the whole of the income of the property is to be expended for the purposes of the temple after the expenses of the management of the estate are paid, and the expenses of the temple shall be defrayed in the manner the Government for the time being may deem fit.

The question that arises is this : The heirs, the persons who would succeed, were it not for this deed, as being the nearest male relations of Darshan Singh, claim that this is not a real endowment of the property to the temple. If it had been a real endowment, they admit that, according to Hindu law, it was a valid disposition of Darshan Singh's property. But they say : "No, it is not a reality ; it is merely a mode, a specious device, of making a provision for the daughter-in-law and daughters which Darshan Singh could not otherwise have made," and they say it is bad as against them. The answer made is : "No, here is a deed which ought to be read just as it appears, and there is no reason why it should not be construed as meaning simply what the language says, a gift for the maintenance of the idol and the temple, under which the idol is to take the property, and, for the rest, the family are to be the administrators and managers, and to be remunerated with half the income of the property. If the income of the property had been large, a question

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might have been raised, in the circumstances, as throwing some doubt upon the integrity of the settlor's intention, but, as the entire income is only 800 rupees, it is obvious that the payment to these ladies is of the most trifling kind, and certainly not an amount which one would expect in a case of this kind.

Now it is said that, according to previous decisions of this Board, there is authority for reading the terms of this deed in some very different way from what it would naturally be assumed to be if properly read. We have been referred to a decision of Sir George Turner in a case of *Sonatum Bysack v. Sreemutty Juggutsoondree Dossee* (1) and to *Ashutosh Dutt v. Doorga Churn Chatterjee* (2). On looking at those cases, the first was a case in which Sir George Turner held that, although nominally there was a gift at the beginning to the idol, that gift was so cut down by subsequent disposition as to leave it clear that the subsequent disposition ought to prevail rather than the earlier one, and that consequently there was no gift to the idol such as to make the property pass as an absolute and entire interest in its favour. The second case was also a decision of this Board, and came to very much the same thing. It was a question of the construction of a will, taken as a whole, and it was said there was not a complete gift to the idol; it was cut down by the subsequent disposition to the family. Here there is no such cutting down. There is, in the beginning, a clear expression of an intention to apply the whole estate for the benefit of the idol and the temple, and then the rest is only a gift to the idol *sub modo* by a direction that of the whole, which had already been given, part is to be applied for the upkeep of the idol itself and the repair of the temple, and the other is to go for the upkeep of the managers. There was no reason why the disponent should not nominate the members of his family as his managers, and he has done so. And there is nothing in that which militates against the propriety of his earmarking a certain part of the money to remunerate them as managers so long as they should so continue.

Their Lordships are of opinion that the judgment of the Court of the Judicial Commissioner, which proceeded substantially upon these grounds, is right, and they humbly advise His Majesty that the appeal should be dismissed with costs.

*Watkins and Hunter* :—Solicitors for the Appellants.

*T. L. Wilson & Co.* :—Solicitors for the Respondents.

J. M. P.

*Appeal dismissed.*

(1) (1859) 8 M. I. A. 66.

(2) (1879) I. R. 6 I. A. 182; I. L. R. 5 Calc. 438

## CIVIL RULE.

• Before Sir Asutosh Mookerjee, Knight, Judge and Mr. Justice Cuming.

TARAPADA GHOSE

v.

JAGAT MOHINI DASL. \*

Civil.

1916.

August, 28, 29.

*Provincial Small Cause Courts Act (IX of 1887), Section 17—Security bond, accepted by Court, but not registered—Order setting aside an ex parte decree, validity of.*

The requirements of section 17 of the Provincial Small Cause Courts Act are mandatory.

Where a security bond was given and accepted by the Court but not registered, it was held that an *ex parte* decree cannot be set aside under section 17 as the essential pre-requisites have not been complied with.

Application for revision by the Plaintiff.

Application for setting aside an order of a Small Cause Court Judge which sets aside an *ex parte* decree.

The material facts and arguments appear from the judgment.

*Babu Surendra Nath Guha* for the Petitioner.

*Babus Dharendra Lal Khastgir* and *Jogesh Chandra Bose* for the Opposite Party.

The judgment of the Court was delivered by

**Mookerjee, J.**—We are invited in this Rule to set aside an order of a Small Cause Court Judge which sets aside an *ex parte* decree under section 17 of the Provincial Small Cause Courts Act. The ground assigned is that the order has been made though the requirements of that section have not been fulfilled. It appears that the *ex parte* decree was made on the 26th August, 1915. On the 30th November, 1915, the defendant made an application to set aside the *ex parte* decree, and, as required by the proviso to sub-section (1) of section 17, filed along with the application what purported to be a security bond to cover the amount due under the decree. By this instrument, immovable property was offered as security. The document and the title-deeds of the properties offered by way of security were examined by an officer of the Court and he reported in favour of their sufficiency. The document was then placed before the Judge who, on the day following, accepted the report of the officer. Nothing was done subsequently by the defendant till the 20th May, 1916 when she obtained a return of the

August, 29.

\* Civil Rule No. 670 of 1916 against an order of Babu Rajani Kanta

• Chatterjee, Small Cause Court Judge, Sealdah, dated the 24th June 1916.

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document for registration in accordance with law. The document was duly presented, but the registering officer declined to register it on the ground that it had not been presented within the time allowed by law, namely, four months from the date of execution. The position, consequently, was that on the day when the application to set aside the *ex parte* decree was taken up for disposal, that is, on the 24th June, 1916, there was no valid security bond before the Court. No doubt, security had been offered, the value had been tested, and the document had been approved by the Court, but steps had not been taken by the applicant to have it registered, so as to make it a document operative in law. Notwithstanding the protest of the plaintiff decree-holder, the Court proceeded to hear the application and came to the conclusion that, as the summons was not served on the petitioner, the *ex parte* decree must be set aside. The Court then proceeded to give the following direction: "Although the security given and accepted by the Court was not registered, the plaintiff will not at all be prejudiced when the same property has been attached. This application is granted and the attachment shall subsist until the disposal of the suit. Fresh security be given within a fortnight." It is worthy of note that the attachment, which had been effected at the instance of the decree-holder, came to an end as soon as the *ex parte* decree was set aside, and it was not competent to the Judge to order that the attachment shall subsist thereafter, though it might have been open to him to make an order for attachment before judgment, if an application in that behalf was made by the plaintiff and the requisite grounds were established for that purpose. The substance of the matter, thus is that the Judge has set aside the *ex parte* decree, although no security has been given by the defendant. The question arises whether this order can be sustained.

On behalf of the defendant, it has not been disputed that the requirements of section 17 are mandatory, as has been laid down in the cases of *Jagi Ahir v. Bishen Dayal* (1); *Jeun v. Budhiram* (2); *Basiruddin v. Sonaula* (3); *Soma v. Wadi* (4) *Jagan Nath v. Chet Ram* (5), and *Chaturvedula v. Chaturvedula* (6). This position is not and cannot be disputed. But we are pressed not to interfere in the exercise of our revisional jurisdiction, because, it is asserted, no injury will be done to the plaintiff. It is said that all that the

(1) (1890) I. L. R. 18 Calc. 83.

(2) (1904) I. L. R. 32 Calc. 339.

(3) (1910) 15 C. W. N. 102.

(4) (1907) 9 Bom. L. R. 883.

(5) (1906) I. L. R. 28 All. 470.

(6) (1910) I. L. R. 34 Mad. 88; 7 M. L. T. 308.

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Court has done is to direct a re-trial, and if the plaintiff has got a good case, he will, no doubt, succeed again. In our opinion, this view should not be adopted in this case. The plaintiff, who got the *ex parte* decree, had obtained a valuable right, subject no doubt to the liability to have the decree vacated at the instance of the defendant, if the mandatory requirements of section 17 were fulfilled. There has however, been no compliance with these essential pre-requisites. No explanation, plausible or otherwise, had even been offered to show how the security-bond came to remain in Court for so many months after it had been approved and why steps were not taken in time to have it registered.

In these circumstances, we must decline to yield to the invitation of the defendant to ignore the mandatory requirements of the law in the manner suggested.

We hold accordingly that this Rule must be made absolute, the order of the Small Cause Court Judge, dated the 24th June, 1916 cancelled and the *ex parte* decree restored. There will be no order for costs in these proceedings.

R. M. M.

*Rule made absolute.*

*Before Mr. Justice Beachcroft and Mr. Justice Walmsley.*

JAGANNATH MANDAL AND OTHERS

v.

JALADHAR MANDAL.\*

CIVIL.  
1917.  
February, 19, 26.

*Appeal—Civil Procedure Code (Act V of 1908), Sec. 47, O. 47, R. 1—Order dismissing application for restoration of execution case.*

In execution of a rent decree, a certain holding was advertised for sale. Subsequently a petition was filed purporting to be made by the decree-holder, certifying that he had received payment in full and praying for dismissal of the execution case on full satisfaction. The decree-holder afterwards put in a petition praying that the order of dismissal should be cancelled on the ground that the certificate filed was a forgery and that the execution case should be allowed to proceed. The petition was rejected. The application purported to be made under order 47, rule 1 of the Code of Civil Procedure and the Court's order was passed under that order :

\* Civil Rule No. 858 of 1916, in *Re Mls. Appeal No. 41 of 1916* of the Court of the District Judge of Khulna.



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*Held*, that an appeal lay under section 47 of the Code of Civil Procedure against the order dismissing the application,

Application for revision by the judgment-debtors.

Application for execution.

The material facts appear from the judgment.

*Babus Manmatha Nath Mukerjee and Lal Mohan Ghose* for the Petitioners.

*Babus Mahendra Nath Ray and Banku Behari Mullick Chowdhury* for the Opposite Party.

C. A. V.

The judgments of the Court were as follows :

*February, 26.*

**Walmsley, J.**—The opposite party obtained a rent decree against the petitioners, and applied for execution by sale of the holding. The holding was advertised for sale on July 19, 1915. On July 16, 1915 however a petition was filed purporting to be made by the decree-holder, certifying that he had received payment in full and asking for the execution case to be dismissed. On July 19, 1915 the learned Munsiff dismissed the case on full satisfaction. On July 24, 1915 the decree-holder put in a petition saying that he had not received the money, that the certificate was a forgery, and asking for sanction to be granted under section 195, Criminal Procedure Code, or a prosecution ordered under section 476, Criminal Procedure Code. Again on August 6, 1915 the decree-holder put in two petitions asking that the order passed on July 19 should be cancelled, and that the execution case should be allowed to proceed. On these petitions the Court held an enquiry into the circumstances, and on February 19, 1916 both petitions were dismissed, on the finding that the money had really been paid. The decree-holder appealed, and the learned District Judge reversed the finding of the Munsif and ordered execution to proceed.

The judgment-debtor obtained this Rule calling on the decree-holder to show cause why the order of the District Judge should not be set aside.

On behalf of the petitioners it is urged that the applications of August 6, 1915 must have been made under order XLVII, and that no appeal lay against an order rejecting them. It is also said that the only remedies open to the decree-holder were an application for review of judgment, and an appeal against the order dismissing the application for execution.

The decree-holder did not take the latter alternative, and I cannot understand how it would have been possible for him to appeal against an order which *prima facie* was made with his full consent, with no material on the record by which he could challenge its

correctness. It seems to me clear that it was his duty to ask the Court of first instance for an enquiry about the genuineness of the petition filed on July 15, and that is the step he took. No doubt the words "Order XLVII, Rule 1" are to be found on his application and in the order-sheet but that is of no moment : We have to look at the substance of his applications. Now he did not allege that the Munsif had made a mistake : he did not offer new and important evidence to be considered with the other materials on which the order was passed, but he went to the root of the matter, and attached the petition of satisfaction which formed the sole basis of the order. I fail to see how an application of this nature can be regarded as an application for a review of judgment. It is one which would have taken the form of a suit but for the provisions of section 47 of the Civil Procedure Code, and I regard it as an application under that section. It follows that an appeal did lie to the District Judge.

The learned vakil has conceded, very properly, that having regard to the findings of fact recorded by the learned Judge he cannot press the petition on the merits.

The Rule therefore is discharged, with costs, 5 gold mohurs.

Beachcroft, J—I agree.

A. T. M.

*Rule discharged.*

*Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice  
Walmsley.*

BALAKESHWARI DABEE

*v.*

JNANANANDA BANERJEE.\*

*Purdanashin lady—Examination on commission—Previous appearance in criminal case—Civil Procedure Code (Act V of 1908), Sec. 132.*

A *purdanashin* lady may completely alter her mode of life and cease to be included in the statutory description of "women, who according to the customs and manners of the country ought not to be compelled to appear in public." When this transformation has taken place, she can no longer claim, as of right, the statutory exemption formulated in section 132 of the Code of Civil Procedure.

\* Civil Rule No. 471 of 1917, against an order of N. N. Ghosh, Esq. Subordinate Judge of Burdwan, dated the 7th June, 1917.

CIVIL.

1917.

Jagannath

Jaladhar.

Walmsley, J.

CIVIL.

1917.

July, 4.

CIVIL.

1917.

Balakrishwari

v.

Jnanananda.

But, if she is, in fact, a *pardanashin* lady, she is not deprived of the statutory protection, merely because she may have previously appeared in public. As regards criminal cases, there has, perhaps, been a slight divergence of judicial opinion on the question of the examination of *pardanashin* ladies on commission.

Application for revision under section 115 of the Code of Civil Procedure by the Petitioner.

The petitioner moved the Court below to institute proceedings under the Legal Practitioners Act. Her allegation was, that on the 31st July, 1916, the opposite party, a pleader, received from one Bhakta Das Samanta, a vakalatnamah, purporting to be executed by her and another person and filed the same in connection with a certain civil suit then pending; that the said vakalatnamah was a forged document; that the petitioner after coming to know of the said fraudulent and illegal acts instituted a criminal case against the said Bhakta Das Samanta; that the petitioner also instituted proceedings in the civil Court under section 13 of the Legal Practitioners Act charging the opposite party with unprofessional conduct. In the criminal case, the Court room was cleared and the petitioner was examined in camera. In the proceedings under the Legal Practitioners Act, the petitioner prayed for the issue of a commission for her examination. This prayer was rejected. Hence this application for revision.

*Babus Biraj Mohan Mojumdar* and *Ajendra Nath Dutt* for the Petitioner.

*Dr. Jadu Nath Kanjilal* for the Opposite Party.

The judgment of the Court was delivered by

July, 4.

**Mookerjee, J.**—We are invited in this Rule to set aside an order whereby the Subordinate Judge has refused an application for the issue of a commission for the examination of the petitioner who is a *pardanashin* lady. The petitioner moved the Court below to institute proceedings under the Legal Practitioners Act against the opposite party who is alleged to have acted as her pleader. On the 6th June last, she applied to be examined on commission in support of her allegations. The application was opposed, on the ground that as the applicant had appeared before the criminal Court on the 2nd June to institute a complaint against one Bhakta Das, she should appear before the Subordinate Judge and be examined in Court. The Subordinate Judge thereupon refused the application. In our opinion, the order cannot possibly be supported.

Section 132, sub-section (1) of the Civil Procedure Code, 1908 provides that women, who according to the customs and manners

of the country, ought not to be compelled to appear in public, shall be exempt from personal appearance in Court. It is not disputed that the petitioner is a *pardanashin* Hindu lady, and, according to the customs and manners of the country, ought not to be compelled to appear in public. The question, consequently, arises, whether she has forfeited the exemption she enjoys under sub-section (1) of section 132, by reason of the fact that she has appeared in a criminal Court to institute a complaint; on that occasion, the Court room was cleared and she was examined in camera. In our opinion, the question should be answered in the negative, in accordance with the principles explained by this Court in the cases of *Chamatkar Mohiney Dabee v. Mohesh Chunder Bose* (1) and *Mohesh Chunder Addy v. Manick Lall Addy* (2). In the earlier of the two cases, Mr. Justice Trevelyan observed that he should be exceedingly careful before he forced into the public gaze a woman even though she might have gone outside the *purdah* once, either by way of experiment or otherwise. In the second case, Mr. Justice Stanley ordered a commission to issue, although it was established that the lady had on a previous occasion appeared in Court and was examined seated inside a palanquin. The Subordinate Judge has overlooked the obvious distinction between the voluntary and the compulsory appearance of a *pardanashin* lady in Court to be examined as a witness. No doubt, a *pardanashin* lady may completely alter her mode of life, and cease to be included in the statutory description of "women, who according to the customs and manners of the country ought not to be compelled to appear in public." When this transformation has taken place, she can no longer claim, as of right, the statutory exemption formulated in section 132. But, if she is, in fact, a *pardanashin* lady, she is not deprived of the statutory protection, merely because she may have previously appeared in public. It is not necessary for our present purpose to investigate exhaustively the law applicable in this respect to criminal cases; but as the Subordinate Judge has relied upon the fact of the voluntary appearance of the petitioner in a criminal Court, to her detriment, we may point out that, as regards criminal cases, there has perhaps been a slight divergence of judicial opinion on the question of the examination of *pardanashin* ladies on commission. In this Court, it has been sometimes maintained, [*In re Hurro Soondery Chowdhraïn* (3), *In re Din Tarini Debi* (4); *Abhayeswari v.*

CIVIL,

1917.

Balakeshwar

v.

Jnanananda.

Mookerjee, J.

(1) (1892) I. L. R. 26 Calc. 651.

(2) (1899) I. L. R. 26 Calc. 650.

(3) (1878) I. L. R. 4. Calc. 20.

(4) (1883) I. L. R. 15 Calc. 775.

CIVIL

1917.

Balakeshwari

v.

Jnanananda.

Mookerjee, J.

*Kishori* (1); *Hem Coomaree v. Queen Empress* (2)] that she is entitled to be examined on commission. In Allahabad on the other hand, [*In re Farid-un-nissa* (3); *In re Basant Bibi* (4)] it has been said that a *pardanashin* lady is not entitled as of right to be exempt from personal attendance in Court, although, as a matter of prudence, she should not be compelled to appear. But, whatever may be the exact rule of procedure applicable to criminal cases, the true scope of section 132 of the Civil Procedure Code is not open to serious discussion. We are consequently of opinion that in the present case the application by the lady to be examined on commission should not have been opposed in the Court below or in this Court, and we cannot but express our surprise that a person in the position of the opposite party should have thought it proper to take up and maintain such an attitude.

The result is that this Rule is made absolute. We direct that a commission do issue for the examination of the petitioner in accordance with law. As the Rule has been opposed, the petitioner will have her costs in this Court. We assess the hearing fee at two gold mohurs.

A. T. M.

*Rule made absolute.\**

(1) (1914) I. L. R. 42 Calc. 19; 18 C. W. N. 1020.

(2) (1897) I. L. R. 24 Calc. 551.

(3) (1882) I. L. R. 5 All. 92.

(4) (1889) I. L. R. 12 All. 69.

*Before Mr. Justice Fletcher and Mr. Justice Smither.*

PRAFULLA NATH TAGORE AND OTHERS

v.

MATABADDIN MANDAL AND OTHERS.\*

CIVIL.

1917.

May, 7.

*Bengal Tenancy Act (VIII of 1885), Sec. 169 (1) cl. (c)—Decree for rent, sale in execution of—Sale-proceeds, disposal of—Arrears of rent, since the institution of the suit—Interest on such arrears, if can be paid out of the surplus sale-proceeds.*

Where a sale has been held in execution of a decree for arrears of rent, the landlord is, under section 169 (1) cl. (c) of the Bengal Tenancy Act, entitled out

\* Civil Rule No. 183 of 1917, against the decision of Babu Jagadish Chandra Goswami, Munsiff, 1st. Court, at Sealdah, dated the 9th. December, 1916.

of the surplus sale-proceeds not only to the arrears of rent which accrued due since the institution of the suit but also to the interest due upon such arrears.

- *Maharajadhiraj Bejoy Chand Mohatab Bahadur v. S. C. Mookerjee* (1) followed.

*Maharaja Monindra Chandra Nandy Bahadur v. Asar Mahmud Mandal* (2) dissented from.

Civil Rule.

The applicants obtained a decree for rent against the opposite party, and brought the tenure to sale in execution of that decree. Since the institution of the suit for rent, certain arrears of rent accrued due in respect of the tenure. The applicant's decree having been satisfied, there remained a balance in the hands of the Court. The applicants then made an application under section 169 of the Bengal Tenancy Act for payment to them out of the surplus sale-proceeds the rent that fell due after the institution of the suit, the interest thereon, and the costs incurred by them. The Court directed the payment of rent only out of the surplus sale-proceeds, and rejected the applicants' other prayers as regards interest and costs.

Against that order an application was made to the High Court, and the Rule was issued.

*Babu Broja Lal Chakravarti* (with him *Babu Hira Lal Chakravarti*) for the Petitioners: Under section 54 cl. (3) of the Bengal Tenancy Act the amount of rent due in this case is an "arrear," and so it must bear interest according to section 67, of the Act. The case of *Maharajadhiraj Bijoy Chand Mohatab Bahadur v. S. C. Mookerjee* (1) supports my contention. If interest is not allowed, the decree-holder landlord will be under the necessity of bringing a fresh suit for realisation of the interest only.

*Babu Surendra Nath Bose* (with him *Babu Bon Behari Sirkar*) for the Opposite Party: It is only a privilege which the decree-holder landlord enjoys under section 169 cl. (c) of the Bengal Tenancy Act, that he gets the arrears of rent without bringing a regular suit. It does not seem to be the intention of the legislature that in a summary proceeding under the section all the claims of the decree-holder should be satisfied, and all questions relating to the payment of interest or damages in lieu thereof should be solved. I rely on the case of *Maharaja Monindra Chandra Nandy Bahadur v. Asar Mahmud Mandal* (2). The case cited by the other side is distinguishable.

CIVIL.  
1917.  
Prohulla  
v.  
Matabaddin.

(1) (1906) 11 C. W. N. 1106.

(2) (1908) 12 C. W. N. 144 (notes).

CIVIL.

1917.

Profulla  
v.  
Matabaddin.

May, 7.

The judgment of the Court was as follows :

This is a Rule calling upon the opposite party to show cause why the order complained of should not be set aside on the grounds stated in the petition. The applicants before us who are the landlords of the opposite party were the plaintiffs in a rent suit. They having obtained a decree for rent against the opposite party brought the tenure to sale. The tenure having been sold and the decree satisfied, there remained in the hands of the Court a balance representing the surplus of the sale proceeds. Certain arrears of rent having accrued due to the plaintiffs since the institution of the former suit, the petitioners made an application under the provisions of section 169 of the Bengal Tenancy Act for payment to them out of the surplus sale proceeds of those arrears with interest and costs and the learned Judge of the Court below directed payment of those arrears of rent so accrued due after the institution of the suit out of the surplus sale proceeds but did not direct the payment of interest upon such arrears. The only question is whether under the terms of section 169 (c) of the Bengal Tenancy Act interest ought to be directed to be paid out of the surplus sale proceeds on the rent in arrears at the rate provided for by the terms of the Act. The decision of this Court in *Maharajadhiraj Bejoy Chand Mohatab Bahadur v. S. C. Mookerjee* (1), is a clear authority in favour of the plaintiffs petitioners. It is quite true that the observations of Mr. Justice Ghose in that case were not approved of by Mr. Justice Brett in the case of *Maharaja Monindra Chandra Nandy Bahadur v. Asar Mahmud Mandal* (2) But that was a decision of Mr. Justice Brett sitting alone. There seems to us to be no reason why we should depart from the terms of the earlier decision of a Bench of this Court in *Maharajadhiraj Bejoy Chand Mohatab Bahadur v. S. C. Mookerjee* (1) ; clearly, it has the advantage of preventing further suits and proceedings in execution to recover the interest which the statute gives on the rent that accrues due after the date of the institution of the former suit. We think we ought to follow the decision in *Maharajadhiraj Bejoy Chand Mohatab Bahadur v. S. C. Mookerjee* (1) and make this Rule absolute so far as regards interest and direct interest to be paid at the rate provided for by the statute on the rent accrued due after the institution of the suit in execution of the decree in which the tenure was ultimately brought to sale.

A point has also been argued before us as regards the costs in the Court below. No doubt, the Court has jurisdiction to award costs if it thinks fit ; but in this case the Court having given to the peti-

(1) (1906) 11 C. W. N. 1106.

(2) (1908) 12 C. W. N. 144 (notes).

tioners no costs, we see no reason to interfere with the discretion of the Court below in that respect.

The Rule is accordingly made absolute on the terms stated above with costs one gold mohur.

A. N. R. C.

*Rule made partly absolute.*

CIVIL.

1917.

Prafulla

v.

Matabaddin.

*Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice  
Walmsley.*

KANAI LAL GHOSE

v.

PATINDRA NATH CHANDRA.\*

CIVIL.

1917.

May, 14, 15.

*Appeal—Order in execution proceeding—Specific Relief Act (I of 1877), decree under—Review—Jurisdiction—Civil Procedure Code (Act V of 1908), Sec. 151.*

No appeal lies against an order passed in execution of a decree made under section 9 of the Specific Relief Act.

The term 'suit' in section 9 of the Specific Relief Act, includes an execution proceeding on the basis of a decree.

Where there is an inherent incompetency in a Court, no consent can confer upon the Court that jurisdiction which it does not possess.

*Meenakshi v. Subramaniya* (1) referred to.

It is a patent misapplication by a Court of section 151 of the Code of Civil Procedure, if the Court, in the exercise of its inherent power, assumes jurisdiction by way of review where it was expressly forbidden by the legislature to entertain such an application.

Application by the Plaintiff decree-holder.

Application for execution of decree.

The material facts and arguments appear from the judgment.

*Babu Satindra Nath Mukherjee* for the Petitioner.

*Babu Lalit Mohan Banerjee* for the Opposite Party.

The judgment of the Court was delivered by

**Mookerjee, J.**—We are invited in this Rule to set aside an order made in execution of a decree for costs in a suit under section 9 of the Specific Relief Act. The petitioner instituted this possessory

\* Civil Rule No 82 of 1917, against the orders of Mr. G. N. Ray, District Judge of Burdwan, dated the 13th March and 28th August, 1916 and an order of Babu Narendra Nath Ghose, Munsiff of Burdwan, dated the 4th August, 1915. (1) (1887) L. R. 14 I. A. 160.

May, 15.



CIVIL.

1917.

Kanal

v.

Jatindra.

Mookerjee, J.

suit against five defendants, one of whom contested the claim and appeared at the trial. The suit was ultimately decreed in favour of the plaintiff with costs and interest. The concluding portion of the judgment ran as if, the suit was decreed against all the defendants. The decree, however, was framed as a decree against one defendant only, namely, the fifth defendant who had resisted the claim. The plaintiff decree-holder applied for execution and for recovery of the costs from all the defendants. The Court held that the decree was in essence against the fifth defendant alone and so dismissed the application for execution against the other defendants. The decree-holder thereupon appealed to the District Judge. He held that the decree, interpreted by the judgment, must be deemed a decree against all the defendants and accordingly directed execution to proceed against all of them. Subsequently, some of the defendants other than the fifth defendant applied to the District Judge to review his judgment on the ground that he had no jurisdiction to entertain the appeal. The District Judge accepted this contention as well-founded and thus discharged his original order. The result was that the order of the trial Court stood restored. The plaintiff then obtained the present Rule, which calls upon the defendants to show cause why the orders made by the Courts below should not be set aside and why such other order should not be passed as to this Court might seem fit and proper. Consequently all the orders made by the Courts below are before us for consideration.

Section 9 of the Specific Relief Act provides as follows: "No appeal shall lie from any order or decree passed in any suit instituted under this section nor shall any review of any such order or decree be allowed." The first question for determination is, whether the term 'suit' includes an execution proceeding on the basis of the decree in the suit. In our opinion, the question must be answered in the affirmative. This view was taken in the case of *Thomas Souza v. Gulam Moidin Beari* (1) and was subsequently adopted by the Punjab Chief Court in the case of *Moufuz Ali v. Birjinand Kirat* (2).

Though, we have not been able to trace any reported decision on the point in this Court, it is plain that the view taken by the Madras High Court is in conformity with a principle which has been repeatedly recognised and applied here. Section 102 of the Code of Civil Procedure provides that no second appeal shall lie "in any suit of the nature cognizable by Courts of Small Causes, when the

(1) (1902) I. L. R. 26 Mad, 438.

(2) (1915) P. L. R. 45.

CIVIL.

1917.

Kanal

v.

Jatindra.

Mookerjee, J.

amount or value of the subject-matter of the original suit does not exceed five hundred rupees." This provision is a reproduction of section 585 of the Code of 1882 which replaced section 27 of Act XXIII of 1861. It was ruled by this Court in the case of *Anund Chunder Roy v. Sidhy Gopal Misser* (1) that the expression 'suit' in section 27 of Act XXIII of 1861 included execution proceedings, and this view was subsequently affirmed by a Full Bench in the case of *Gora Chand Misser v. Baykanto Narain Singh* (2). A similar view has been adopted in all the other High Courts. *Din Dayal v. Patrakhan* (3); *Narayan Parmanand v. Nagindas Bhaidas* (4) and *Ammal v. Maracoir* (5). When a similar question arose before this Court in connection with section 153 of the Bengal Tenancy Act, it was ruled in the case of *Shyama Charan Mitter v. Debendra Nath Mukerji*, (6) that the bar provided in that section was applicable, not merely to the decree made in the suit, but extended to orders made in execution of such decree. This position was recently approved by a Special Bench of seven Judges in *Prafulla v. Nosibannessa* (7). We are consequently of opinion that the appeal to the District Judge was incompetent. The fact that no objection was taken to his jurisdiction when the appeal was heard, did not invest him with authority to entertain the appeal; for as ruled by the Judicial Committee in *Meenakshi v. Subramaniya* (8), where there is an inherent incompetency in a Court, no consent can confer upon the Court that jurisdiction which it does not possess. It is equally clear that the District Judge was not competent to entertain the application for review, because the order he had initially made was an order of the description mentioned in the concluding paragraph of section 9; so that if the appeal to him was incompetent as we hold it was, the application for review was equally incompetent. It cannot further be maintained that as the District Judge had exercised a jurisdiction which was not vested in him by law, he had inherent power to set matters right by way of review; for, as was explained in *Sasi Bhusan Mookerjee v. Radha Nath Bose* (9), it would be a patent misapplication by a Court of section 151 of the Code of Civil Procedure, if it were, in the exercise of its inherent power, to assume jurisdiction by way of review where it was expressly forbidden by the legislature to entertain such an application. The position thus is that the appeal was heard by the District Judge without jurisdiction and the review was granted

(1) (1867) 8 W. R. 112.

(3) (1896) I. L. R. 18 All. 481.

(5) (1906) I. L. R. 30 Mad. 212.

(7) (1916) 24 C. L. J. 331.

(9) (1914) 20 C. L. J. 433 (439).

(2) (1873) 12 B. L. R. 261 F. B.

(4) (1905) I. L. R. 30 Bom. 113.

(6) (1900) I. L. R. 27 Calc. 484.

(8) (1887) L. R. 14 I. A. 160.

CIVIL.  
1917.  
Kanai  
v.  
Jatindra.  
Mookerjee, J.

by him equally without jurisdiction, and both these orders must consequently be discharged. This leaves us with the order of the Court of first instance and the only question for consideration is, whether that order is of such a character as to justify an interference by this Court. We are not satisfied that the order was erroneous on the merits. We have examined the decree as also the judgment and our inclination is to hold that the view taken by the Munsiff was correct on the merits. But even if it were regarded as erroneous, the error which the Munsiff committed would be nothing more than an error of law, due to a mis-construction of the decree; such an error does not constitute a sufficient ground for our interference in the exercise of our revisional jurisdiction.

The result is that this Rule is discharged, but each party will pay his own costs.

A. T. M.

*Rule discharged.*

## APPELLATE CIVIL.

*Before Mr. Justice Fletcher and Mr. Justice Newbould.*

NANDA LAL BANERJEE

v.

UMES CHANDRA DASS.\*

CIVIL.  
1917.  
April, 20.

*Bengal Tenancy Act (VIII of 1885), Sec 167—"Date of sale," meaning of.*

The words "date of sale" in section 167 of the Bengal Tenancy Act, specially where the sale took place under the Code of 1882 and where the purchaser could acquire no interest until the sale-certificate was issued, mean the date of the confirmation of the sale, and not the date when the sale actually took place.

*Matangini Chaudhurani v. Sreenath Das* (1) followed.

*Banks Behary Das v. Krishna Chandra Bhowmick* (2) referred to

*Yusuf Gazi v. Asmat Mollah* (3) not followed.

Appeal by the Plaintiff.

Suit for declaration of title.

\* Appeal from Appellate Decree No. 134 of 1915, against the decision of H. Walmsley Esq., District Judge of 24-Pergannas, dated the 12th September, 1914, affirming the decision of Babu Latu Behari Bosu, Subordinate Judge at Allpur, dated the 30th June, 1913.

(1) (1903) 7 C. W. N. 552.

(2) (1913) 18 C. L. J. 170.

(3) (1912) 17 C. W. N. 440.

The material facts will appear sufficiently from the judgment of Fletcher J.

*Babus Dwarka Nath Chuckerbutty and Ramtaran Chatterjee* for the Appellant.

*Babu Mohesh Chandra Banerjee* for *Babu Jyotish Chandra Hazrah* for the Respondent.

The following judgments were delivered :

**Fletcher, J.**—This is an appeal from a decision of the learned District Judge of the Twenty-four Pergannahs affirming the decision of the Subordinate Judge at Alipore. The plaintiff sued for a declaration of his right to a putni which he had purchased at a sale for arrears of rent held under the provisions of the Bengal Tenancy Act. The sale at which the plaintiff purchased took place on the 16th December, 1907. Litigation ensued after the sale and the sale was not confirmed until the 5th September, 1908. On the 22nd September 1908, the plaintiff took possession and the present defendant then set up a dur-putni right. On the 8th March 1909, an application was made under section 167 of the Bengal Tenancy Act to annul the defendant's encumbrance and the notice was served on the 13th April, 1909. The present suit was brought on the 12th April, 1912. The defence as raised by the defendant in his written statement was, first of all, that the plaintiff was the benamdar of the defaulted tenant. That was found against the defendant. So was also the defence raised that no notice had been served under the terms of section 167 of the Bengal Tenancy Act. But the suit was dismissed on the ground that the plaintiff had notice of the defendants' encumbrance before he purchased the property and, therefore, he was out of time under the terms of section 167 in not having served the notice to annul the defendant's encumbrance in time. It has been argued in this appeal that that point was not raised in the defence and an issue had been settled with regard to it and that the defendant ought not to have been allowed to enter into that defence. There is a good deal to say with regard to that. In the view that I take of the authorities of this Court, I am unable to agree with the view of the learned Judge of the lower appellate Court that the date of the sale was the 16th December 1907, and not the date on which the sale was confirmed, namely, the 5th September, 1908. If the 'date of sale' mentioned in section 167 of the Bengal Tenancy Act is the date when the sale is confirmed, then it is quite clear that the notice that was served on the 13th April 1909, was within one year from the date of the sale.

Civil.  
1917.  
Nanda  
Umes

April, 20.

Civil.  
1917.  
Nanda  
v.  
Umes  
Fletcher, J.

The sale to the plaintiff was made under the provisions of the Code of Civil Procedure of 1882 and, under section 316 of that Code, the title to the property sold in execution vested in the purchaser from the date of the certificate of sale and not before. Section 65 of the present Code of Civil Procedure is in different terms. The question as to what is the meaning of the words "date of sale" as used in the sections of the Bengal Tenancy Act has formed the subject of judicial decision in certain cases before this Court. The first case that reference may be made to is the case of *Matangini Chaudhurani v. Sreenath Das* (1), where Maclean, C. J. and Mr. Justice Stevens held that the words 'date of sale' used in section 169, Sub-section (1) cl. (c) of the Bengal Tenancy Act meant the date of the confirmation of sale and not the actual date of sale. It is quite true that that decision was on section 169; but there cannot be any difference, so far as I can see, between the meaning of the words 'date of sale' as used in section 169 and in section 167. It is quite true that subsequent to that decision, the legislature amended section 169 by altering the words 'date of sale' to 'the date of the confirmation of sale'; but still the decisions of this Court remain unaffected that the words 'date of sale' used in the Act as they existed before the amendment meant the date when the sale was confirmed. There is no reason why that decision should not govern the words 'date of sale' as used in section 167. The next decision that reference may be made to is the decision in the case of *Yusuf Gazi v. Asmat Mollah* (2), a decision of Mr. Justice Brett and Mr. Justice Sharfuddin. There the learned Judges held that the words 'date of sale' in section 167 meant the date on which the sale of the holding or tenure had actually taken place and the reason on which they based their judgment is this: That as section 169 as amended referred to the date of the confirmation of the sale, therefore, in section 167 where the words 'the date of the confirmation of the sale,' did not appear the words 'date of sale' must refer to a period other than the date of the confirmation of the sale. In my opinion, there is a manifest fallacy. Section 167 and section 169 prior to the amendment both used the same words namely, the words "date of sale." It was judicially declared in this Court that the words 'date of sale' in section 169 meant the date of the confirmation of the sale and the legislature in amending section 169 clearly did not consider the terms of section 167 and section 167 remained unaffected by that amendment. I think that the learned Judges who decided the case of *Yusuf Gazi v. Asmat*

(1) (1903) 7 C. W. N. 552.

(2) (1912) 17 C. W. N. 440.

*mollah* (1) were not justified in distinguishing the case, or, at any rate, in departing from the decision in the case of *Matangini Chaudhurani v. Sreenath Das* (2), on the ground that by a subsequent amendment of section 169 different words had been used to those that appeared in section 167. It may be doubted whether the same learned Judges in a subsequent case did not to some extent go back upon that decision because in the case of *Bibi Taibatannessa Chowdhurani v. Provabati Dasi* (3) those learned Judges came to the conclusion that in certain circumstances the words 'date of sale' as mentioned in section 167 of the Bengal Tenancy Act meant the date of the confirmation of the sale. With all due respect to the learned Judges, the conduct of a defendant cannot alter the meaning of the words used by the legislature in a particular section of an Act. I think the learned Judges in the decision of *Bibi Taibasannessa v. Provabati* (3) have shown in certain cases, at any rate, the words 'date of sale' as used in section 167 of the Bengal Tenancy Act mean the date when the sale is confirmed. The next decision that has been referred to is the decision of a Judge sitting singly in this Court; that is, the decision of Mr. Justice N. R. Chatterjea in the case of *Banko Behary Das v. Krishna Chandra Bhowmick* (4). There the learned Judge held distinctly that the words 'date of sale' used in section 167 of the Bengal Tenancy Act meant the date when the sale was confirmed and he did so relying upon the decision of this Court in the case of *Matangini Chaudhurani v. Sreenath Das* (2). It is quite true that that decision is not binding on us; but the opinion of the learned Judge is, of course, entitled to the highest respect. In his view, the case was covered by the case of *Matangini Chowdhurani v. Sreenath Dass* (2) and I think he rightly held so. The case of *Matangini Chaudhurani v. Sreenath Dass* (2) which is the first of these authorities is not distinguishable from the present case. It is quite true that against the decision of Mr. Justice N. R. Chatterjea a Letters Patent appeal was preferred; but the judgment of the learned Judges who heard the Letters Patent Appeal rested on grounds other than that as to the meaning of the words 'date of sale' as used in section 167, but they cast no doubt upon the correctness of the decision of Mr. Justice N. R. Chatterjea in that respect. I think the words 'date of sale,' especially where the sale took place under the Code of 1882 and where the purchaser could acquire no interest until the sale certificate was issued mean clearly the date of the confirmation of the sale. To hold otherwise, would practically in some cases take away

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(1) (1912) 17 C. W. N. 440.

(2) (1903) 7 C. W. N. 552.

(3) (1909) 10 C. L. J. 640,

(4) (1913) 18 C. L. J. 170.

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from the plaintiff the right to annul encumbrances at all because, as in the present case where the plaintiff has been found to have known of the encumbrance before the date of the actual sale and litigation ensued, and the sale was not confirmed for a considerable time after the date of the sale, if the date referred to in section 167 of the Bengal Tenancy Act be the date of the actual sale, then the purchaser will have no period within which he can annul encumbrances unless he elects to annul the encumbrances before his title to the property has been finally determined. I think that the view that was expressed by Mr. Justice N. R. Chatterjea in the case of *Banko Behary Das v. Krishna Chandra Bhowmick* (1), is the correct view and that the words 'date of sale' referred to in section 167 of the Bengal Tenancy Act mean the date when the sale is confirmed, and not the date when the property is actually sold to the purchaser. That being so, even if this defence was open to the defendant in this case, I think it was not sufficient to bar the plaintiff's suit. The learned Judge of the lower appellate Court dismissed the plaintiff's suit on his finding that the plaintiff was out of time for the purpose of annulling the encumbrance. There were other issues arising on the merits and they have not been determined. The case must, therefore, go back to the lower appellate Court to have the appeal reheard with reference to the other issues which have not been disposed of. Costs will abide the result of the rehearing by the lower appellate Court.

**Newbould, J.**—I agree.

A. N. R. C.

*Appeal allowed: Case remanded.*

(1) (1913) 18 C. L. J. 170.

*Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice  
Walmsley.*

SURENDRA NATH GHOSE AND OTHERS

v.

KALIGOPAL MOJUMDAR.\*

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*Ejectment—Benamidar—Fictitious suit—Fictitious sale—Court, if can enforce  
unreal title.*

In suits for land an action cannot be maintained by a *benamidar*: *Atrabannessa  
v. Safaiullah* (1) referred to.

A Court cannot be invited by a person, who has deliberately sought to utilize the machinery of the Courts for the purpose of creation of fictitious titles, to recognise and enforce such an unreal title.

Appeals by the Defendants in L. P. No. 18 and by the Plaintiff in L. P. No. 22.

Suit for recovery of possession of land on establishment of title.

The material facts appear from the judgment.

The primary Court decreed the suit. The first appellate Court reversed that decision and dismissed the suit. On second appeal, the decision of the lower appellate Court was reversed and the case was remanded for retrial, by the following judgment of

**Roe, J**—This is an appeal from a decision of the Subordinate Judge of Jessore reversing a decision of the Munsiff of Narail. The facts found by the learned Subordinate Judge are as follows:—There was an estate of which the proprietor was one Radhika Prosad. Radhika Prosad died leaving a widow, Kadambini. Kadambini's brother is the plaintiff in this suit. The defendants in this suit are the reversioners who will succeed to the estate of Radhika Prosad on the death of Kadambini. The learned Subordinate Judge has found as a fact that in order to defeat these reversioners, Kadambini allowed an *ex parte* decree to be made in favour of her brother against her in respect of debts falsely alleged to have been due to her brother from the estate of her husband at the time of his death and allowed her brother the present plaintiff, to put up for

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December, 21.

\* Letters Patent Appeals Nos. 18 and 22 of 1916, against the decision of Mr. Justice Roe, dated the 21st December, 1915, in Appeal from Appellate Decree No. 570 of 1914, against the decision of Babu Devendra Nath Pal, Subordinate Judge, 1st Court of Jessore, dated the 29th November, 1913, reversing that of Babu Pran Kumar Bosu, Munsiff, 1st Court, at Narail, dated the 31st August, 1912

(1) (1915) 22 C. L. J. 259; I. L. R. 43 Calc. 504.



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sale the properties in suit, and buy them in execution of the decree thus obtained. He further found that the estate of Radhika Prosad thus ostensibly purchased by the present plaintiff did not in fact pass to the present plaintiff but remained; in spite of these proceedings, in the possession of Kadambini and that Kadambini is still the real and beneficial owner of the estate. Subsequent to the pretended transfer of the estate to the plaintiff an application for partition was made by the plaintiff and a separate estate formed of the share of the deceased Radhika Prosad. Of that share, the plaintiff has been recorded as the sole proprietor in the Collectorate registers. At the time of the partition the defendants objected to the entry of the plaintiff's name as the proprietor of this share and three months grace was given to them to institute a suit in the civil Court to consolidate their objection to the Collector's proceedings. Nothing was done in the civil Court and the Collector completed his partition. The dispute between the parties now before the Court is with regard to two *khals* lying on the boundary between the estate allotted to the plaintiff and land claimed by the defendants as patnidars, under an estate contiguous to the estate allotted to the plaintiffs. The case before the Court of first instance was fought on the following issues, (1) Is the plaintiff the real owner of the property? (2) If he is a *benamdar*, has he any right to sue? (3) Are the defendants barred by section 119 of the Partition Act from contesting the suit? (4) Are the defendants estopped from denying the title of the plaintiff? And the last issue was whether in fact the *khals* in suit are a part of the estate allotted to the plaintiff by the Collector or belong to the defendants as a part of the estate of which they are patnidars? These issues were decided by the Subordinate Judge in appeal. (1) That the plaintiff was a mere *benamdar*. (2) That as a mere *benamdar*, he is not entitled to maintain the suit. (3) That there was no estoppel. (4) There was no bar under the Partition Act. (5) That the question to which estate do the *khals* in suit appertain had not been satisfactorily decided. On the two first issues the suit was dismissed by the lower appellate Court. Against that decision the present appeal has been lodged. The question of estoppel and the bar under section 119 of Act V of 1897 present no difficulty. The estoppel set up is that the defendants purchased from the plaintiff a part of the property which was, as found by the lower Court, fraudulently obtained in the execution sale, fraudulently conceived between Kadambini and the plaintiff. This purchase did not put the defendants to any disadvantage. It did not cause them to do anything which they would otherwise

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have not done. There can be no question of estoppel in this matter. There is no bar under section 119 to a suit of this character. The defendants are contesting the suit as patnidars of an adjoining estate. It is open to them to contest a decision arrived at by the Collector that the *khas* form part of the estate under partition. It is also open to them to say that the lands were not as a fact allotted by the Collector to the plaintiff's share; nor is section 27 a bar to the suit. It is open to any party contesting the plaintiff's title to say that he had no title upon which the Collector could record him as the proprietor.

It remains only to deal (1) with the question of fact whether the plaintiff is in fact a *benamdar* and (2) the question of law, whether a *benamdar* can sue.

From the judgment of the Subordinate Judge it is clear that he has come to a definite finding of fact that the plaintiff has no real interest in the property. That finding of fact cannot be challenged in second appeal. The only question remaining is whether as *benamdar*, the plaintiff can maintain the suit. It is urged by the learned pleader for the defendants that the cases are overwhelming in which it has been held that in a suit for immovable property, a *benamdar* has no *locus standi*. In support of this contention he has cited the cases of *Gopeekrist Gosain v. Gungapersaud Gosain* (1); *Hara Gobind Adhikari v. Akhoy Kumar Mozumdar* (2); *Mohendra Nath Mookerjee v. Kali Proshad Johuri* (3); *Issur Chandra Dutt v. Gopal Chandra Das* (4); *Barada Sundari Ghose v. Dina Bandhu Khan* (5). All these are direct authority for the proposition that in a suit for an estate composed of immovable property, a *benamdar* cannot sue. But they are not in my opinion necessary authority for the proposition that in a suit on behalf of an estate for a declaration that a certain parcel of land, belongs to that estate, the party who is in ostensible possession of that estate on sufferance by the real owner, cannot maintain a suit for such a declaration as is desired in the present case. In this case the dispute between the plaintiff and the defendants is not as to the ownership to the estate created by the Collector. If it were so, undoubtedly the plaintiff would not be competent to maintain this suit in the face of the findings arrived at by the Subordinate Judge. The point in dispute is: Does the land in suit belong to the estate created by the Collector or to the putni of which the defendants are the representatives of the proprietor. I am of opinion that in face of the acquiescence of

(1) (1854) 6 M. I. A. 53.

(2) (1889) I. L. R. 16 Calc. 364.

(3) (1902) I. L. R. 30 Calc. 265.

(4) (1897) I. L. R. 25 Calc. 98.

(5) (1898) I. L. R. 25 Calc. 874.

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Kadambini in the entry of the plaintiff's name as proprietor of this estate, in face of her continued acquiescence in the ostensible ownership put forward by the plaintiff, and in face of the purchase made by the defendants from the plaintiff of portions of the estate we must presume that she has authorised the plaintiff to represent the estate for whose benefit he now claims the land and that he is therefore competent to maintain a suit and the defendant is incompetent to deny his title. In this view, I am supported by the case of *Ram Bhurosee. Singh v. Bissessur Narain Mahata* (1). I hold that inspite of the fact that the plaintiff is a mere *benamdar*, in the particular circumstances of this particular case, he was competent to maintain the suit. It is therefore necessary that a decision be made with regard to the question whether the disputed land falls within the estate which the plaintiff claims or within the putni which the defendant claims. The appeal must therefore be allowed, the decree of the Court below set aside and the case remanded to the lower appellate Court in order that this issue be determined. If it is found that the disputed *khals* fall within the estate of the deceased Radhika Prosad, a decree will be made in the plaintiff's favour. If it is found that it falls within the defendants' putni, the suit will be dismissed with costs. The costs of this appeal will abide the result.

Against this decision, both plaintiff and defendants appealed under clause 15 of the Letters Patent.

*Babu Surendra Chandra Sen* for the Appellants in Appeal No. 18 and for the Respondent in Appeal No. 22.

*Babus Jogesh Chandra Roy, Biraj Mohan Mojumdar and Surendra Nath Das Gupta* for the Respondent in Appeal No. 18 and for the Appellants in Appeal No. 22.

The judgment of the Court was delivered by

**McCokerjee, J.**—These appeals have been preferred under clause 15 of the Letters Patent, against a judgment of Mr. Justice Roe in a suit for recovery of possession of land on establishment of title. The case for the plaintiff is that the property in dispute is comprised within his estate which originally belonged to the husband of his sister Kadambini, that he sued her for recovery of the money due from her husband, that he obtained a decree and that in execution thereof he purchased the property at a sale held by the Court. The case for the defendant is that the plaintiff has no title to the estate mentioned, because the proceedings against his sister were collusive and fraudulent. The defendant further pleads that the disputed land is comprised within his estate and not within the estate claimed by

the plaintiff. The trial Court found against the defendant and decreed the suit. Upon appeal, the Subordinate Judge reversed that decision and dismissed the suit. He held that as the proceedings taken by the plaintiff against his sister were fraudulent and collusive, he had not acquired title to the disputed property. Upon appeal to this Court, Mr. Justice Roe has reversed the decision of the Subordinate Judge and has remanded the case for retrial upon the question, whether the disputed land is comprised within the estate claimed by the plaintiff or that owned by the defendant. He has held, upon the authority of the decision in *Ram Bhurosee Singh v. Bissessur Narain Mahata* (1), that the plaintiff is entitled to maintain this suit although the proceedings taken by him against his sister may have been collusive. The plaintiff and defendant are both dissatisfied with the order of remand. The defendant has accordingly appealed on the ground that, on the facts found, the plaintiff has acquired no title and is not competent to maintain this action. The plaintiff has, on the other hand, appealed on the ground that the order of remand is unnecessary, as, upon the facts found, a decree should have been made in his favour on the merits. We must consider the appeal of the defendant (L. P. A. 18 of 1916) first, because if his contention is well-founded, the suit must be dismissed.

The argument of the defendant is based upon the findings of the Subordinate Judge as to the unicity of the proceedings taken by the plaintiff against his sister. The plaintiff, no doubt, sued her sister for recovery of money alleged to have been advanced to her husband. But the Subordinate Judge has found that there was no foundation for this claim, as there was in reality no debt due to the plaintiff from his brother-in-law. Consequently, the suit instituted by the plaintiff against his sister was based upon an imaginary claim. There was no defence to that action and an *ex parte* decree was made. That decree was nominally put into execution. A collusive sale was held and title was supposed to have passed to the plaintiff from his sister by virtue of the proceedings taken in Court. The defendant urges that, in these circumstances, the plaintiff acquired no title whatsoever to the property of his sister. We are of opinion that this contention is well-founded.

Suits of this character are not altogether unknown and their effect is vividly described by Lord Brougham in a celebrated passage in the judgment of the House of Lords in *Bandon v. Becher* (2): "A sentence is a judicial determination of a case, agitated between real parties, upon which real interest has been settled; in order to make a sentence, there

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(1) (1872) 18 W. R. 454.

(2) (1835) 3 Cl. &amp; F. 479 (511).

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must be a real interest, a real argument, a real prosecution, a real defence and a real decision ; of all these requisites, not one takes place in the case of collusive and fraudulent suits ; there is no Judge but a person, invested with the ensigns of the judicial office, is misemployed in listening to a fictitious cause proposed to him. There is no party litigating, there is no party defendant and there is no real interest brought into question. The whole proceeding is collusive and fraudulent. It cannot therefore be treated as a judicial proceeding, but may be passed by as availing nothing to the party who sets it up." But the plaintiff respondent contends that as the decision in this litigation would be operative as against the real owner, [*Rambehari Sarkar v. Surendra Nath Ghose* (1)] the suit should be allowed to proceed at his instance. We are emphatically of opinion that we should not accede to this argument. Courts of justice should not be permitted to be utilised for the purpose of creating fictitious titles, which must inevitably tend to weaken the sanctity which justly attaches to judicial transactions. It is no doubt open to a party to impeach the reality of a transaction between two private individuals ; it is equally open to him to impeach the reality of a judicial proceeding. But the Court should certainly be slow to encourage the creation of fictitious title in the manner disclosed by the proceedings placed before us.

Reference was made to the decision of Sir Richard Couch C. J. in *Ram Bhurosee Singh v. Bissessur Narain Mahata* (2) where a suit for possession of land by a *benamdar* was allowed to be maintained. That decision, however, is not in conformity with a long series of cases in this Court both anterior and subsequent to it, which will be found reviewed in *Hari Gobind Adhikari v. Akhoy Kumar Mozumdar* (3) and *Mohendra Nath Mookerjee v. Kali Proshad Joluri* (4). We must take it now as well-settled in this Court that in suits for land an action cannot be maintained by a *benamdar*: *Atrabannessa Bibi v. Safatullah Mia* (5). But, in our opinion, the case now before us, is much stronger than any of the cases just mentioned. This is a suit by a person who has deliberately sought to utilise the machinery of the Courts for a purpose for which Courts of justice do not exist : viz., for the purpose of creation of fictitious titles, and we fail to appreciate how a Court can be invited, by a person who has so acted, to recognise and enforce such an unreal title. Considerations which may be applicable to *bonafide* purchasers clearly do not arise here.

(1) (1913) 19 C. L. J. 34.

(2) (1872) 18 W. R. 454.

(3) (1889) I. L. R. 16 Calc. 364.

(4) (1902) I. L. R. 30 Calc. 265.

(5) (1915) 22 C. L. J. 259 ; I. L. R. 43 Calc. 504.

*Radha Madhab v. Kalpataru* (1); *Akhil v. Manmatha* (2); *Gore v. Stacpoole* (3).

It has finally been suggested that we should direct that the real owner be joined as a plaintiff in this suit. No doubt a step of this character has been commended in some of the cases found in the books: *Sita Nath Shaha v. Nobin Chandra Roy* (4); *Bhobosoondree Dasseah v. Issur Chunder Dutt* (5); *Bhola Pershad v. Ram Lall* (6); but the course has not been adopted in others: *Hari Gobind Adhikari v. Akhoy Kumar Mozumdar* (7). It is obvious that the real owner here could not be joined as a party except upon an application by herself. But even if such an application were made, we could not possibly grant it, because if the application were granted, the allegations in the plaint would require to be completely recast. It has further been stated to us that the suit by the real owner, if instituted now, will be in time; consequently there is no substantial reason why we should grant this belated application for addition of the real owner, contrary to the allegations in the plaint and the evidence.

The result is that the appeal preferred by the defendant (Letters Patent Appeal 18 of 1916) is allowed and that by the plaintiff (Letters Patent Appeal 22 of 1916) is dismissed. The suit will stand dismissed with costs in all the Courts; but there will be no separate order for costs in the appeal by the plaintiff.

A. T. M.

*Suit dismissed. L. P. Appeal No. 18 allowed:*

*L. P. Appeal No. 22 dismissed:*

(1) (1912) 17 C. L. J. 209.

(2) (1913) 18 C. L. J. 616.

(3) (1913) 1 Dow H. L. C. 18 (30).

(4) (1879) 5 C. L. R. 102.

(5) (1872) 11 B. L. R. 16 P. C.

(6) (1896) 1, L. R. 24 Cal. 34.

(7) (1889) L. L. R. 16 Cal. 364.

*Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Cuming.*

DOKARI JODDAR AND OTHERS

v.

NILMANI KUNDU.\*

*Limitation—Suit for recovery of possession—Auction-purchaser—Limitation Act (IX of 1908), Sch. I. Arts. 137, 138, 142—Burden of proof.*

\* Appeal from Appellate Decree No. 4126 of 1913, against the decree of Babu Debendra Nath Pal, Subordinate Judge of Jessore, dated the 30th August, 1913, affirming that of Babu J. P. Chatterjee, Munsiff of Jhenidah, dated the 29th June, 1912.

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Article 137, Sch. I of the Limitation Act applies to an auction-purchaser of the rights of a judgment-debtor not in possession at the date of the sale, while article 138 applies to an auction-purchaser of the rights of a judgment-debtor in possession at the date of the sale. In the former case the suit must be brought within 12 years from the date when the judgment-debtor is first entitled to possession; in the latter case the suit is in time if brought within 12 years from the date when the sale becomes absolute.

*Gopal v. Krishnarao* (1) referred to.

The burden lies entirely upon the plaintiff to prove not only that he has a title but a subsisting title which he has not lost by the prescriptive sections of the Limitation Act; in other words, he must show which article of the Limitation Act saves his suit from the bar of limitation.

*Nitrasur v. Nund Lall* (2); *Gostain Doss v. Seroo Koomaree* (3); and *Secretary of State v. Vira Rayan* (4) referred to.

Appeal by Defendants Nos. 1 to 4.

Suit for recovery of possession of land upon declaration of title.

The material facts and arguments appear from the judgment.

*Dr. Dwarka Nath Mitter* for the Appellants.

*Babus Mahendra Nath Ray* and *Kumar Sankar Roy* for the Respondents.

The judgment of the Court was delivered by

July, 12

**Mookerjee, J.**—This is an appeal by the first four defendants in a suit for recovery of possession of land upon declaration of title. The Court of first instance found in favour of the plaintiff upon the questions of title and possession and made a decree accordingly. Upon appeal by the defendants the Subordinate Judge has affirmed the decision of the trial Court upon the question of title, and that portion of his judgment cannot, in our opinion, be successfully attacked in second appeal. But the appellants argue that his decision upon the question of limitation is erroneous, inasmuch as he has overruled the plea of limitation on the ground that "there is no satisfactory evidence that the defendants had possession before the alleged date of dispossession and were in possession for upwards of 12 years." In our opinion, this contention must prevail.

The plaintiff seeks to recover possession of the disputed land on the strength of title by purchase at a sale in execution of a mortgage-decree which was held on the 19th September, 1899 and was confirmed on the 9th November, 1899. Symbolical possession was delivered to him by the execution Court on the 17th February, 1900.

(1) (1900) I. L. R. 25 Bom. 275.

(2) (1860) 8 M. I. A. 199 (220); 1 W. R. P. C. 51.

(3) (1872) 19 W. R. 192 (193).

(4) (1880) I. L. R. 9 Mad. 175.

He alleges that the judgment-debtors were in possession at the date of sale and continued in possession for a short time afterwards, and that when they vacated the land on or about the 13th April, 1901, he went to take possession and was met by the defendants. He did not, however, institute the present suit to eject the defendants till the 29th June, 1911. The defendants, on the other hand, allege that they have been in possession from a long time before the execution sale and that the claim is barred by limitation.

It is clear that the suit is governed by either article 137 or article 138 or article 142 of the Limitation Act. As observed by Ranade, J in *Gopal v. Krishnarao* (1), article 137 applies to an auction-purchaser of the rights of a judgment-debtor not in possession at the date of the sale, while article 138 applies to an auction-purchaser of the rights of a judgment-debtor in possession at the date of the sale. In the former case the suit must be brought within 12 years from the date when the judgment-debtor is first entitled to possession; in the latter case the suit is in time if brought within 12 years from the date when the sale becomes absolute. It has sometimes been held that article 138 applies only to suits brought against the judgment-debtor or persons who have derived title from him and not to suits brought against persons who repudiate the title of the judgment-debtor: *Raghu Nath v. Syed Samed* (2); *Khimda v. Krishnadas* (3). It may be observed that if this restricted construction be adopted, article 142 must be held applicable and would lead to the same result as would follow from an application of article 138. In any event it is plain that the burden lies entirely upon the plaintiff to prove not only that he has a title but a subsisting title which he has not lost by the prescriptive sections of the Limitation Act; in other words he must show which article of the Limitation Act saves his suit from the bar of limitation [*Nitrasur v. Nund Loll* (4); *Gossain Doss v. Servo Koomaree* (5); *Secretary of State v. Viru Rayan* (6). In the present case the plaintiff asserts that the judgment-debtor whose right, title and interest he purchased was in possession at the date of the sale and subsequently; the onus of proof is upon him and if he establishes the truth of his allegation, his suit is not barred whether article 138 or 142 be applied; if on the other hand he fails to prove

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(1) (1900) I. L. R. 25 Bom. 275.

(2) (1908) 7 C. L. J. 560; 12 C. W. N. 617.

(3) (1910) 12 C. L. J. 378.

(4) (1860) 8 M.I. A. 199 (220); 1 W. R. P. C. 51.

(5) (1872) 19 W. R. 152 (193.)

(6) (1880) I. L. R. 9 Mad. 175.



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that the judgment-debtor was in possession at the date of the sale, article 137 clearly applies ; in that event, to save his suit from the bar of limitation, he must prove that his judgment-debtor became first entitled to possession within 12 years before the commencement of the suit, i. e., that the judgment-debtor lost possession on some date subsequent to the 29th June, 1899. The Subordinate Judge clearly committed an error of law when he threw the burden of proof upon the defendants to establish that they had been in adverse possession for over 12 years. The fundamental point for determination thus is, whether or not the judgment-debtor was in possession at the date of sale. The finding of the Court of first instance upon this point was perfectly clear. The Subordinate Judge has not affirmed that finding ; on the other hand he has given reasons which are obviously insufficient to support his conclusion, and are erroneous in law.

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and the case remitted to him in order that he may rehear the appeal on one point only, namely, the question of limitation. The costs of this appeal will abide the result.

A. T. M.

*Appeal allowed : Case remanded.*

## CRIMINAL REVISION.

*Before Mr. Justice Teunon and Mr. Justice Newbould.*

CRIMINAL.

1917.

April, 4, 1917.

GANESH CHANDRA SIKDAR AND ANOTHER

v.

KING-EMPEROR.\*

*Excise—Mrita Sanjivani Sudha—Manufacture and sale of—Excise Act (V B. C. of 1909), Sec. 2 (14).*

The manufacture and sale of a preparation of *Mrita Sanjivani Sudha* otherwise than in conformity with the provisions of the Excise Act, is an offence.

A preparation containing alcohol, though a medicinal preparation or may be used for medicinal purpose, is within the provisions of the Bengal Excise Act.

\* Criminal Revision No. 246 of 1917, against an order of Mr. Alfred Bose, Sub-Divisional Magistrate, of Goalando, dated the 9th February, 1917.

Application for revision.

The petitioners were convicted under section 46 (a) of the Bengal Excise Act, as amended by Act VII of 1914, and each of them was sentenced to pay a fine of Rs. 200, or in default, to undergo six weeks' rigorous imprisonment.

The material facts appear from the judgment.

*Babus Manmatha Nath Mukerjee* and *Phanindra Lal Maitra* for the Petitioners

*Mr. B. C. Mitter* (*Offg. Advocate-General*) and *Mr. Camell* for the Crown.

C. A. V.

The judgment of the Court was delivered by

**Teunon, J.**—In this case the petitioners before us have been convicted in respect of the manufacture and sale of a liquid substance spoken of as *Mrita Sanjivani Sudha* and have been sentenced under section 46 (a) of the Bengal Excise Act V of 1909 each to pay a fine of Rs. 200 or in default to undergo six weeks' rigorous imprisonment.

The manufacture and sale is admitted and the contention of the petitioners, who are Kabirajes by profession, is that *Mrita Sanjivani Sudha* is a beneficent drug, prepared in accordance with a formula to be found in an Ayurvedic Pharmacopœia, and used for medicinal purposes only. The ingredients it is said are, *gur*, ginger, betel nut, and various barks, and after a certain period of fermentation, from this base with certain additions in the shape of spices, crushed fruits, and *babla* skins the finished product is obtained by a process of distillation. The preparation, there is evidence, is prescribed for women suffering from fever or bowel-complaints after child-birth and other virtues claimed for it are that it stimulates the appetite, aids digestion, and when taken at bedtime soothes the wakeful.

It may be conceded that the preparation possesses all these virtues but the question still remains whether it is an excisable article within the meaning of the Bengal Excise Act. In that Act 'excisable article' has been defined as meaning "any liquor or intoxicating drug as defined by or under this Act" and in section 2, clause (14) as amended by Bengal Act VII of 1914 liquor has again been defined as meaning "liquid consisting of or containing alcohol" and as including various specified substances.

It is not disputed that *Mrita Sanjivani Sudha* contains alcohol and analysis shows that the four sample phials or bottles submitted to the chemical Examiner consisted of the usual volatile bye-products of distillation and fermentation, volatile essential oils, water, and alcohol, the proportion of alcohol ranging from 68.3 per cent. to

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87 per cent. In other words, the preparation as sold, or as prepared and put up for sale, is an alcoholic liquid varying in strength from 31.7 to 13 under proof. There can therefore be no question that the manufacture and sale of this preparation otherwise than in conformity with the provisions of the Excise Act is an offence unless the petitioners can show that this article has been exempted by notification under the provisions of section 90 of the Act or that by reason of "repugnancy in the subject" the definition is not applicable. It is conceded that the article is not within the terms of any notification issued under section 90. It is however contended that to *Mrita Sanjivani Sudha*, as a medicinal preparation manufactured, prescribed and sold by Kavirajes, the definition contained in the Act does not apply and in support of this contention reliance is placed on the cases *Ganesh v. Queen-Empress* (1); *Matilal v. Emperor* (2), and *Satis v. King-Emperor* (3). It is unnecessary to discuss these cases which were all decided prior to the amendment of the Act made in 1914. Whatever may have been the state of the law at the time when the foregoing cases were decided, the intention of the law has been made clear by the amended Act of 1914, and to say now that a preparation containing alcohol is not within the provisions of the Bengal Excise Act simply because it is a medicinal preparation or may be used for medicinal purposes would be to stultify this court and ignore the plain purpose of the Legislature.

On the question of sentence, having regard to the fact that the manufacture of this *Mrita Sanjivani Sudha* has been continued on the strength of the decision in favour of the elder petitioner in *Ganesh v. Queen Empress* (1) and the further fact that it does not appear that prior to the present proceedings the petitioners were warned by the Excise authorities, we think that a lesser sentence will meet the ends of justice. We therefore reduce the sentence in each case to a fine of Rs. 100, in default three weeks' rigorous imprisonment.

A T. M.

*Sentence reduced.*

(1) (1896) I. L. R. 24 Calc. 157.

(2) (1912) I. L. R. 39 Calc. 1053.

(3) (1913) 17 C. W. N. 939.

## ORDINARY ORIGINAL CIVIL JURISDICTION.

*Before Sir Barnes Peacock, Knight, Chief Justice and Mr Justice  
Dwarkanath Mitter.*

## IN THE MATTER OF WILLIAM TAYLER.\*

*Contempt of Court—Court of justice, duty of—Libel—Feigned name—Right of  
vindicating one's character by reflecting on the character of another—Court's  
power of committal—Court of record—Libel published while the Court is not  
sitting—Printer and publisher of newspapers—Charging Judge with presumptuous  
tyranny—Criticising the acts of a public man—Unjust and defamatory  
imputations on a Judge—Discretion as to punishment for contempt—Proper  
apology—Punishment, mitigation of.*

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It is incumbent upon Courts of justice to preserve their proceedings from being misrepresented; and the minds of the public should not be prejudiced against persons concerned as parties in causes before the cause is finally heard. The misrepresentation need not be wilful.

Feigned names have been construed a libel upon those persons who were really meant to be libelled.

Whether a libel be public or private, the only method is to proceed at law; and the Court has no cognizance, unless it is a contempt, by being an abuse of its proceedings.

*The St. James's Evening Post* case (1) followed.

A man has no right to vindicate his own character by reflections upon the character of another based upon false statements and wilful suppression of the truth.

The power of committal is given to Courts of justice for the purpose of securing the better administration of justice. Every writing, letter or publication which has for its object to divert the course of justice is a contempt of the Court. It is for that reason that publications of proceedings which have already taken place, when made with a view of influencing the ultimate result of the cause, have been deemed contempt. Every insult offered to a Judge in the exercise of the duties of his office is a contempt; but when the writing or publication proceeds further, and when, not by inference, but by plain and direct language, a threat is used, the object of which is to induce a judicial officer to depart from the course of his judicial duty, and to adopt a course he would not otherwise pursue, it is a contempt of the very highest order.

*Leckmere Charlton's* case (2) referred to.

A Court of record has power to punish, by commitment for contempt, a libel published while the Court is not sitting.

*Crawford's* case (3) referred to.

\* In re Appeal from Original Decree No. 67 of 1868.

(1) (1742) 2 Atk. 469 (470).

(2) (1836-37) 2 My. & Cr. 316 (339).

(3) (1849) 13 Q. B. 613 (627).

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A printer and publisher of a newspaper is as much liable in point of law to be punished for contempt as the author who sent the libellous writing to the editor. The Court has its election to punish both the author and publisher of the newspaper, or either of them

If the printer of a newspaper publish a letter with the name of an author attached to it, he must bear the responsibility if he is unable, when required, to prove that it was published with the authority of the person by whom it purports to have been signed.

If a printer prints anything that is libellous, it is no excuse to say that he had no knowledge of the contents

If a printer publishes defamatory and contemptuous libels sent to him for publication by a gentleman beyond the jurisdiction of the Court, or libels published in another paper beyond the jurisdiction, or if a printer refuses to give up the name of the real author of the libel, his case is different from that of a printer who, having committed an error, apologises and gives up the name of the author.

In a contempt proceeding, there are two modes of proceeding open to High Court; one by a rule calling upon the person to show cause why he should not be adjudged guilty of contempt of Court; the other by attachment.

An attachment is a process that issues at the discretion of the Judges of a Court of record against a person for some contempt for which he is to be committed, and may be awarded by them upon a bare suggestion, or on their own knowledge, without any appeal, indictment, or information.

To charge a Judge with presumptuous tyranny for the mode in which he is proceeding in a matter pending before him, or to publish anything respecting that matter whilst it is under consideration, with a view to induce the Judge to alter his course, is a grave contempt of Court.

It is a high and serious offence to cast unjust and defamatory imputations on a Judge. Judges are subject to be criticised, but they must be protected from unfounded defamation.

If a person undertakes to criticise the acts of a public man, he must take care not to assert that which is not true as the basis of his criticism, and he is bound not to conceal wilfully anything which would show that the criticism is not well-founded.

Discretion as to punishment for contempt of Court depends upon the facts of each particular case.

It is a mitigation of the printer's offence, if he will discover the person who brought the paper to him.

*The St. James's Evening Post* case (1) referred to.

A proper apology may mitigate, but cannot wholly excuse or justify, or form a ground for a total exemption from punishment.

*Quære*: Whether a commitment for contempt could be 'until further orders' which might amount to imprisonment for life.

(1) (1742) 2 Aik. 469 (470).

Charge of contempt of Court.

The material facts appear from the judgment of Peacock, C. J.

**Peacock C. J.**—It is always a most unpleasant duty for a Judge to be compelled to vindicate his own honour, or the dignity of the Court over which he presides, by adopting measures which 'may cause pain, or wound the feelings of any man. But a Judge who would shrink from the discharge of what he considers to be his public duty, merely because it is to him a painful one, is not fit to be entrusted with the office which he holds. To me the duty which I am now called upon to perform is all the more painful, because the gentleman whose conduct is called into question is one—with whom in times gone by I have held social and friendly intercourse. The case is one of public importance, and I am anxious that there shall be no misunderstanding of the views and opinions of the Judges and of the reasons which induced them to adopt the course which they have pursued. Above all, I am desirous that there shall be no further misrepresentations such as those with which unhappily we are called upon to deal. I have therefore thought it right to enter fully into the facts and law of the case, and I have reduced into writing the greater portion of my judgment.

Mr. W. Tayler was formerly a member of the Bengal Civil Service. After his retirement he was admitted as a vakeel of the late Sudder Court; and upon the amalgamation of the late Supreme and Sudder Courts, he, in common with all the vakeels of the late Sudder Court, was enrolled as a vakeel of the High Court. He subsequently carried on business as a mooktear or law agent in the District of Patna, in which, before his retirement from the Civil Service, he had acted as Commissioner. Among other clients, he was retained by Ranee Usmedh Kower, the elder Ranee of Ticaree, for two years, upon a retaining fee of Rs. 500 a month for looking after her suits, in addition to which he was to receive a reward for every case that he might win according to its importance. Matters did not proceed amicably between Mr. Tayler and the Ranee, and the result was that two suits were commenced—one by Mr. Tayler against the Ranee to recover a sum of Rs. 29,773, consisting of Rs. 20,910 alleged to be due for principal and interest on a bond given, as Mr. Tayler alleged, for fees due to him, and Rs. 8,000 and interest alleged by Mr. Tayler to be the balance due on account of his salary or retaining fee; the other by the Ranee against Mr. Tayler to recover money alleged to have been received by him on her account.

In the suit brought by Mr. Tayler, the Court held that the bond had been improperly obtained, and the result was, that Mr. Tayler's

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suit was dismissed with costs, and Rs. 6,110 were decreed to the Ranee in her cross suit. The case (1) is reported in the 2nd Vol. Weekly Reporter, page 307.

On the 29th January 1866, the Ranee applied to the Judge of Behar for execution, and in the month of February in that year, a tenure called Dergaon, belonging to Mr. Tayler, was attached in execution. That attachment, by virtue of the provisions of section 240, Act VIII of 1859, prevented Mr. Tayler from selling the estate so long as the attachment was in force. On the 26th February a consolidated appeal to Her Majesty in Council was filed by Mr. Tayler in the two suits, and on the 8th March he obtained a Rule calling upon the Ranee to show cause why, upon his giving security, the execution should not be stayed pending the result of his appeal to her Majesty in Council; and the sale under the attachment was stayed pending that Rule. The Rule was sent to the Judge of Behar for service, and he thereupon passed an order in the execution case that the proceedings should be stayed "for the time," that is to say, until the Rule to show cause should be disposed of; and as there was nothing which he could do in the execution case whilst that Rule was pending, he, at the time of transmitting to the High Court his return of having served the Rule upon the Ranee, ordered that the proceedings for execution should be struck off the file of cases pending in his Court.

When the Rule *nisi* came on for hearing in the High Court, it was considered more just that, as the Ranee had obtained a decree, she should be allowed to execute it on giving security, than that she should be restrained from realising the amount upon Mr. Tayler's giving security. Accordingly, upon the 18th May, it was ordered that the decree should be executed upon the Ranee's giving sufficient security to the satisfaction of the Judge, for the due performance of such decree as Her Majesty in Council should make.

That Rule was received by the Judge on the 29th May, and thereupon the execution case was again numbered and restored to the file of cases pending in his Court. The Ranee, who was a lady of large property, tendered security, which was admitted on the 7th December 1866. The delay which occurred between the transmission of the Rule to the Judge and the acceptance of the security which the Ranee offered is not accounted for on the evidence in the cause. I have frequently found in cases in which execution is stayed until the decree-holder gives security, that great delay is caused by inquiries into the sufficiency of the security, to which the debtor or his agent

(1) *Ranee Usmat Koowar v. Tayler*. (1865) 2 W. R. 307.

objects merely for the purpose of delaying the execution. Whether this was the case in the present case or not does not appear, and it is not necessary to enquire. It is not likely that the Ranee, who is a lady of large property, would have had any difficulty in finding security for so small an amount, or that Mr. Tayler would have run any risk if she had been allowed to execute her decree without security. But Mr. Tayler, having appealed to Her Majesty in Council, was entitled by law to have security, and it was granted to him.

It is clear that there was no improper delay on the part of the Ranee in completing her security. Delay is not generally the game of the judgment-creditor, and it is expressly found by the Judge that there was no default by the Ranee in carrying on the case.

On the 11th day of October, Mr. Tayler sold to Mussamut Zuhoorun, the wife of Ahmedoollah, for Rs. 55,000, the estate which had been attached under the Ranee's decree. Mr. Tayler says that the purchase was made by Ahmedoollah in the name of his wife. That is very probable, and I shall treat the case as if it were so, and give Mr. Tayler the full benefit of that argument. But when Ahmedoollah is described as an old pleader at Patna, for the purpose of raising an inference that he must have known of the attachment at the time of the purchase, it must be borne in mind that the estate was at Gya and not at Patna, and that the sale was under an attachment from the Court at Gya, and not from the Court at Patna.

After the sale by Mr. Tayler, the estate was again attached by the Ranee under her decree, and the 25th February 1867 was fixed for the sale. On the 13th February, Mussamut Zuhoorun intervened and disputed the right of the Ranee to sell under her decree, and claimed a right to the property upon the ground that her purchase was completed before the second attachment. The case was decided against her, and an order was made that the estate should be sold. Mussamut Zuhoorun thereupon satisfied the decree to prevent the sale of the estate which she had purchased and for which she had paid Mr. Tayler Rs. 55,000, and commenced a suit against him to recover Rs. 12,406, the amount which she had been compelled to pay in satisfaction of the Ranee's decree.

In the written complaint in that suit, it was distinctly charged that Mr. Tayler, the defendant, had concealed the fact of his liability to the Ranee under the decree, and of the attachment of the estate in execution. The plaintiff stated that she had paid an adequate price for the estate, and that after the defendant, Mr. Tayler, had secured the entire purchase-money, and had conveyed the estate, and had put her in possession of it, the estate was publicly proclaim-

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ed for sale ; that she intervened and objected to the sale, but that her claim as a purchaser was overruled on the 23rd February 1867 ; that the vendor, Mr. Tayler, having failed to satisfy the decree, she was compelled to pay the amount due under it in order to preserve the estate which she had purchased.

The following is a translation of the defence set up in the defendant's written statement put in on behalf of Mr. Tayler, and verified by Mr. Kelly, his agent. He says :—

*"First.*—On the principle that a purchaser is bound to inform himself of all the advantageous and disadvantageous circumstances connected with the property he is going to purchase, plaintiff has no claim upon your petitioner in reference to the judgment-debt payable to Ranee Usmedh Kower, as numerous precedents of the Sudder Dewanny Adawlat and the High Court in support of this argument are extant.

*"Second.*—If the plaintiff, without asking your petitioner and obtaining his concurrence, has, to *serve her own ends*, liquidated the judgment-debt due to Ranee Usmedh Koer, she cannot by any rule or regulation recover from your petitioner the money so paid.

*"Third.*—At the time of sale, mouzah Dergaon, in accordance with the proceedings of the Civil Court of Gya, dated 1st February, 1866, A.D., and 13th February, 1867, A.D., was attached and advertised for sale, and the plaintiff in full knowledge of the circumstances purchased the mouzah, and nothing was kept secret from her : on the contrary, the condition of the property was above board at the time of sale, and the plaintiff in full knowledge of all particulars, in whatsoever way acquired, purchased the property.

*"Fourth.*—The plaintiff has purchased a most valuable property, namely, a property of the value of upwards of Rs. 88,000, for a small price of Rs. 55,000, and since she procured a property worth Rs. 88,000 for a trifling sum of Rs. 55,000, she raised no objection in reference to the decree money of Ranee Usmedh Kower, of which, in consequence of the attachment of Dergaon, she was undoubtedly cognizant, nor did she enter into any arrangements for the deduction of the amount, nor had she any document executed for her satisfaction : on the contrary, considering the bargain for Rs. 55,000, notwithstanding the payment of the decree money, to be a cheap one, she forthwith upon securing the sale deed paid up in a lump the whole of the purchase-money and took possession of the property. Under these circumstances, she has no reason whatever to complain ; hence the suit brought by her is quite uncalled for. Your petitioner prays that for the ends of justice her claim may be dismissed."

Here let me remark that in the defence set up on the part of Mr. Tayler, no suggestion was made that the Ranee's attachment had ceased to have effect in consequence of the execution case having been struck off the file, or that the first attachment had been superseded by the second. The point was not alluded to, or even suggested: on the contrary, it was admitted that the estate was liable to be sold under the decree. The plaintiff, when she intervened and set up her purchase as a bar to a sale under the attachment, took the objection, but it was very properly overruled by the Judge in a very clear and decisive judgment, and the plaintiff satisfied the decree to save from sale the estate which she had purchased. That judgment was put in evidence in the suit against Mr. Tayler. It might just as well be contended that all the proceedings in a suit in this Court are nullified, and that the parties must commence *de novo*, if a case is for any reason taken out of the peremptory board. The point is too absurd for argument.

The suit proceeded, and the case was tried by Baboo Girish Chunder Ghose, the Principal Sudder Ameen of Patna, who laid down two issues:—

*First.*—Whether or not the plaintiff has the right to a refund of the amount of Rs. 11,381-13-6 paid by her in order to save the disputed property from sale, with interest claimed by her; or whether the suit is barred by the application of the maxim of *caveat emptor*?

*Second.*—Did the plaintiff know at the time of the purchase as to the property being attached by Usmedh Kower in satisfaction of a claim against the vendor? Did the vendor inform her about the said attachment when the negotiations were completed?

As to the first issue, the Principal Sudder Ameen found that, according to the legal maxim *caveat emptor* a purchaser ought to exercise a proper caution in order to ascertain the amount and nature of the interest which he is about to buy; that if, without instituting proper and sufficient enquiries within his reach, he foolishly purchases any property in which the vendor's interest was not what it was represented to be, he will be entitled to compensation for the loss he sustains for the defectiveness of title and quality of the property bought, for it is his own folly and *laches* not to use the means of knowledge within his reach. He then entered into the question whether the plaintiff had made due enquiries, and finding that she had not done so, he said she must be presumed to have purchased the estate with all faults, except as to the extent of the right of the vendor. He added:—

"It is contended that the fact of the attachment was fraudulently

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concealed, but there is no proof whatever to support the allegation. On the other hand, such a thing as the attachment, which was known to the world so far as the village was concerned, could not by any attempt on the part of the vendor be *industriously concealed*, for it was known to hundreds of people residing in the village sold. The attachment would be known in no time if a proper man had been deputed to make necessary enquires on the spot. Therefore, the concealment, if it was one, was by no means fraudulent, and, unless fraud be proved, the contract could not be annulled; and had there been anything like fraud on the part of the vendor, the plaintiff would undoubtedly have come to the Court for the cancellation of the contract. As there was no legal fraud on the part of the vendor, the cause of the complaint falls to the ground, and hence it is to be presumed that, with the liability existing on the property, the plaintiff has purchased the same."

He therefore ordered the suit to be dismissed with costs.

In the latter part of his judgment the Principal Sudder Ameen alluded to a contention on the part of the plaintiff that the execution case had been struck off the file and subsequently revived, and added:—

"Admitting her contention to be correct, I see no force in it, for the simple reason that, in that case, she was not bound to pay the amount due to the decree-holder; and in case the property was sold, she, as a third party, might have sued for the cancellation of the sale on the ground that there existed no attachment before the sale."

It is not very clear why such a contention should have been urged on the part of the plaintiff in the suit. It was her contention when she intervened and disputed the Ranee's right to sell under the attachment, and probably there may have been some confusion as to the time at which such contention was put forward on her behalf. But it is not very material.

The result of that decision, if upheld, would have been that Mr. Tayler would have had his judgment debt satisfied by the plaintiff, and that she would have had no redress against him.

Mr. Tayler in his letters has cited from *Shakespeare*, but he has not made any quotation from a "*New way to pay old debts*."

The plaintiff appealed to the High Court from the judgment of the Principal Sudder Ameen; and amongst other grounds she urged to the effect—*first*, that the defendant could not take advantage of his own wrong; *second*, that the doctrine of *caveat emptor* did not apply to a case like this, in *which fraud was alleged as the cause of*

*action*; *seventh*, that the very circumstance of the defendant's concealing the fact of attachment on decree was sufficient to show a *fraudulent concealment*, as Mr. Tayler was well aware of such attachment, and sufficient to fix him with liability, unless he proves that the plaintiff purchased with knowledge and paid inadequate value, and *eighth*, that the case was not one of voluntary payment, for the recovery of the money was sought, not from the judgment-debtor, but from the vendor.

The appeal was heard in the First Bench before the Chief Justice and Mr. Justice Dwarkanath Mitter. The case was very fully and ably argued by Mr. Paul as counsel on behalf of Mr. Tayler; the evidence on both sides was fully considered, and every attention and consideration was given to the case which it was in the power of the Court to bestow. It was very properly admitted on behalf of Mr. Tayler, for it could not possibly be denied, that the payment was not voluntary, and the Chief Justice was so fully satisfied of the plaintiff's right to recover upon the ground that she had been compelled to pay Mr. Tayler's debt in order to protect from sale under the Ranee's decree, the estate which she had purchased from Mr. Tayler, that he did not consider it necessary to express any decided opinion upon the other points of the case, *viz.*, whether there was concealment or no concealment, fraud or no fraud. He says:—

"It appears to me that this is a very clear case. The plaintiff seeks to recover the sum of Rs. 12,406 and 7 annas which she paid on account of Mr. William Tayler in discharge of a decree which Ranee Usmedh Kower had recovered against him. It is almost unnecessary to consider whether the plaintiff was a volunteer in paying this money, or whether she paid it under compulsion, because it has been admitted by Mr. Paul, the learned counsel for Mr. Tayler, that the payment was not a voluntary one.

"It appears that the plaintiff purchased an estate from Mr. W. Tayler for the sum of Rs. 55,000; that before the sale to the plaintiff that estate had been attached in execution of the decree; and that the plaintiff paid the amount of the decree and interest in order to prevent the property which she had purchased from being sold in execution. It is said by Mr. Tayler that although the property was sold for Rs. 55,000 it was worth a great deal more; and in proof of that assertion he has called a witness, who if he is to be believed, has shown that Mr. Tayler's estimate of the value was very much under the mark, inasmuch as the estate was worth 2 lakhs. I do not believe the evidence of that witness. It is improbable that he acting as the agent of Mr. Tayler, would have sold for Rs. 55,000

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a property which was worth 2 lakhs; but whether it was worth Rs. 55,000, Rs. 88,000, or 2 lakhs, is wholly immaterial for the decision of this case.

"By section 235 of the Code of Civil Procedure, when property is to be attached in execution of a decree, the attachment is to be made by a written order prohibiting the defendant from alienating the property by sale, gift, or in any other way, and all persons from receiving the same by purchase, gift, or otherwise; and by section 240 of the same Act, it is enacted that when any attachment shall have been made by actual seizure, any private alienation of the property attached, whether by sale, gift, or otherwise, shall be null and void.

"Mr. Tayler, therefore, must, before he sold the property, have been served with an order from the Court prohibiting him from alienating it. He must have been fully aware at the time of the sale that any sale by him would be liable to be defeated by the decree-holder.

"Several witnesses have been called on the part of the defendant, and have proved that the plaintiff at the time that she purchased the estate was aware of the attachment. Enayut Hossein swore that he informed the husband of the plaintiff of the attachment at the time of the execution of the deed of sale. Shaik Eusoof Hossein swore that Enayut Hossein told the husband of the plaintiff in his presence in the house of Wilayut Ali Khan, where the consideration money was paid; and yet Enayut Hossein, who was acting for Mr. Tayler in selling the property, upon cross-examination, stated that he did not remember at what place he told Ahmedoollah about the lien. Ahmedoollah, on the other hand, swears that he never knew of the attachment! and if it were necessary to decide upon the conflicting testimony of the witnesses in the cause, I should have little hesitation in deciding that the plaintiff, at the time of the payment of the purchase-money, was not aware of the attachment. It is hardly likely that, if she had been aware of the attachment, something would not have been said upon the subject. Enayut Hossein, who, according to his own evidence, took the precaution of telling Ahmedoollah about the attachment, swears that he was acting for both parties; and yet, according to his evidence, nothing appears to have been said at the time of the sale as to whether the plaintiff, in consequence of her being allowed to purchase the estate for what Mr. Tayler calls the trifling sum of Rs. 55,000, was to take upon herself to discharge the debt which Mr. Tayler owed the Ranee. Even supposing the plaintiff made a good bargain in buying this estate for Rs. 55,000,

there was no obligation on her part, because she got the estate cheap, to pay Mr. Tayler's debt.

"If it had been intended that she was not only to pay the Rs. 55,000 to Mr. Tayler, but was also to pay off the debt which Mr. Tayler owed to the Ranee, the purchase-money would have been stated, as suggested by Mr. Twidale, to be the Rs. 55,000 and the amount of the debt added; and part of the purchase-money would have been paid to the decree-holder in satisfaction of her decree. It is clear beyond all doubt that the plaintiff has paid Mr. Tayler's debt; that she was under no legal obligation to pay that debt as between her and Mr. Tayler; that she did not pay the debt voluntarily, but under compulsion, to save the estate which she had purchased, and for which she had paid, from sale in execution of the decree; and under the ordinary rules of law, of justice, and of equity, Mr. Tayler, who has had the benefit of having his debt discharged by the plaintiff, would be bound to repay the amount. Even if the plaintiff knew that Mr. Tayler owed the money, and that the estate had been attached, that fact would make no difference, unless she came under an obligation to Mr. Tayler to pay off that debt in consideration of his allowing her to have the estate for Rs. 55,000; yet Mr. Tayler contends that, because she got the estate cheap, she was bound to satisfy the decree against him. I see no reason to believe that Mr. Tayler would have sold the estate to the plaintiff or to any one else for Rs. 55,000 if he could have got 2 lakhs, or even Rs. 88,000 from any other person. This lady was no more bound, without a contract, to pay Mr. Tayler's debt, because she got the estate for Rs. 55,000 than she was to repay Mr. Tayler the difference between Rs. 55,000 and Rs. 88,000, the amount at which he now values it, or the 2 lakhs at which it was valued by his agent.

"In the case of *Exall and Partridge* (1), which was decided on the principles of justice, applicable as much in the mofussil as they are in England, it was held that where the goods of a stranger were on the premises of another person and were distrained by the landlord for rent in arrear, and the stranger was obliged to pay the rent in order to redeem his goods, he might recover the money paid from those who owed the rent.

"It was said by one of the Judges that 'the plaintiff could not relieve himself from the distress without paying the rent. It was not therefore a voluntary, but a compulsory payment. Under these circumstances, the law implies a promise by the three defendants to repay the plaintiff.'

(1) (1799) 8 T. R. 308.

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"Another of the Judges said, 'one of the propositions stated by the plaintiff's counsel certainly cannot be supported, that whoever is benefited by a payment made by another is liable to an action of *assumpsit* by that other, for one person cannot, by a voluntary payment, cause an *assumpsit* against another; but here was a distress for rent due from the three defendants, the notice of distress expressed the rent to be due from them all, the money was paid by the plaintiff in satisfaction of a demand on all, and it was paid by compulsion. Therefore, I am of opinion that this action may be maintained against all the three defendants.'

"Here, then, was a debt of Mr. Tayler's paid under compulsion by a person who was under no obligation to pay it, and the plaintiff is entitled to recover the amount. It is unnecessary, therefore, to consider or to decide whether there was any fraudulent concealment on the part of Mr. Tayler of the fact that the estate had been attached, or to enter into the question whether the recital in the deed amounted to a covenant that Mr. Tayler had power to sell.

"The legal maxim *caveat emptor* has been misapplied. It is wholly inapplicable, and has no bearing whatever upon the present case.

"The Principal Sudder Ameen says that 'the concealment, if it was one, was by no means fraudulent,' but I feel at a loss to understand what notions the Principal Sudder Ameen entertains of fraud, when he holds that if a gentleman sells an estate which he knows has been attached under a decree against him, and conceals the fact from the purchaser, and receives the purchase-money, the concealment is one which does not fall within the class of fraudulent.

"Cases have been cited to show that if an execution case is struck off the file, the attachment which has been made under the execution necessarily falls to the ground.

"Section 245 of the Code of Civil Procedure enacts, that 'if the amount decreed with costs, and all charges and expenses which may be incurred by the attachment, be paid into Court, or if satisfaction of the decree be otherwise made, an order shall be issued for the withdrawal of the attachment; and if the defendant shall desire it, and shall deposit in Court a sum sufficient to cover the expense, the order shall be proclaimed or intimated in the same manner as hereinbefore prescribed for the proclamation or intimation of the attachment, and such steps shall be taken as may be necessary for staying further proceedings in execution of the decree.'

"I find no authority in Act VIII of 1859 for saying that an attachment is at an end if the execution case is struck off the file;

and therefore, if it became necessary to decide upon that point, I should refer the case to a full bench.

"No one, I presume, will contend that if a Judge finds that he has struck off an execution case improperly, he cannot restore it to the file, but that the case must proceed *de novo*. In this case, according to the statement, which must be taken all together, 'the execution decree case had been for a time struck off the register when the sale took place, and subsequently the case was revived, when a sale proclamation issued, on which the plaintiff preferred a claim, and on the claim being rejected, she paid the amount for which the property had been attached.'

"There has been no case cited which goes to the extent of holding that if an execution case is struck off the file, and a proclamation issued upon the attachment which had issued before the case was struck off, the sale would be subject to all incumbrances created by the debtor between the time the attachment was made and the time the property was sold, on the ground that the effect of the attachment was destroyed for ever by the striking the case off the file. Though not expressly in point, the case of *Mohesh Narain Singh v. Kishramund Misser and another* (1) has a strong bearing upon the point.

"For the above reasons, it appears to me that Mr. Tayler is bound to refund the money which the plaintiff was compelled to pay, and did pay, in order to save the estate, which she purchased and paid for, from being sold under the execution."

Mr. Justice Dwarkanath Mitter said (and this is the principal grievance of which Mr. Tayler complains in his letters to the Editor of the *Englishman*)—

"I entirely concur. I feel no hesitation in holding that the plaintiff is entitled to recover, both upon the ground that she has paid a debt due from Mr. Tayler to Ranee Usmedh Kower when she was under no obligation to pay it, as also upon the ground that a fraud has been perpetrated against her by Mr. Tayler in concealing from her the fact that the estate sold by him to her was under attachment in execution of a decree of Court. I should have been extremely sorry if the state of the law were otherwise."

The finding that there was a fraudulent concealment was upon a point raised in the suit and in the grounds of appeal, and one upon which evidence was gone into on both sides.

For pronouncing this judgment upon a point in issue, the learned Judge, as will be presently seen, is charged with "wanton insult and unfounded aspersion." He is charged with having done

(1) (1862) Suth. P. C. 488; 9 M. I. A. 324.

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that for which a District Judge would probably have been suspended. But the charge was made in letters in which the real facts under which the judgment was pronounced were artfully, and I may say wilfully, concealed by Mr. Tayler; and a new state of facts, which was untrue, and which, if true, had never been set up as a defence in the suit, or ever brought to the notice of the learned Judge, was substituted. Mr. Tayler must have known, and I will prove out of his own mouth that he did know, that upon the facts, as they appeared at the time when Mr. Justice Dwarkanath Mitter pronounced his judgment, there was not the slightest ground for complaint. It was not because the Chief Justice felt so confident of the plaintiff's right to succeed upon another point, and abstained from finding upon the issue of fraud, that Mr. Justice Dwarkanath Mitter was not at liberty to express his opinion upon that point, which was directly in issue, without subjecting himself to such charges as those which Mr. Tayler has preferred against him in his letters. As well might a jurymen be charged with wanton insult and unfounded aspersion for pronouncing, upon evidence before him, a verdict of guilty against a man tried upon a charge of theft or embezzlement. The case was one appealable to Her Majesty in Council, and even if it had not been so, it would have made no difference.

Judges, although they may agree as to the judgment which ought to be given in a particular case, do not always agree in the reasons for arriving at that conclusion, or one Judge may have an additional reason, upon which the other has not expressed his opinion. There is no reason why a native gentleman, who by his abilities has raised himself to the Bench of the High Court, is to be maligned and slandered because he has the independence to express an opinion of his own, or even to differ from the Chief Justice. What would become of the independence of Judges if this were to be allowed?

Mr. Tayler says that this dishonoring and unmeasured imputation, judicially cast upon him by Mr. Justice Dwarkanath Mitter, has been recorded by him without one tittle of evidence to support it; that it is wholly untrue and manifestly absurd. But, if he was dissatisfied with the finding, he could have appealed to Her Majesty in Council, for the case was an appealable one, and it is not too late to appeal even now. But Mr. Tayler knew full well that, if he appealed to Her Majesty in Council, he must have appealed upon the case as it stood when the Judge pronounced his judgment. He therefore preferred to appeal to the Editor of the *English*

*man*, and through him to the public, and to rest that appeal upon a false state of facts and a dishonest concealment of the real one.

No one reading the letter of the 7th of April could have imagined that Mr. Justice Dwarkanath Mitter's judgment was a finding upon an issue in the case founded upon what he honestly believed to be the weight of evidence given on both sides. If Mr. Tayler had honestly intended to criticise the judgment, with reference to the evidence given in the cause, he might have done so without objection : he might have set the evidence and commented upon it, so that those who read the criticism might have been able to form their own judgment as to his conclusions.

I now pass from the charge against Mr. Justice Dwarkanath Mitter in reference to his original judgment to the charge brought against him in respect of his refusing to retract upon review.

Here let me again point out that throughout the whole of Mr. Tayler's so-called criticism he treats Mr. Justice Dwarkanath Mitter's finding upon a material issue in the cause as a gratuitous, uncalled for aspersion, and as a wanton insult which he could retract at pleasure. But this is not so. Mr. Justice Dwarkanath Mitter had expressed his judgment upon a material point in the case, and he could not, without granting a review, retract it. The finding had been come to and the judgment had been recorded. The case was one which might have been appealed by Mr. Tayler to Her Majesty in Council, and the plaintiff would have been entitled to have the finding returned with the record.

The case set up by Mr. Tayler in review was, like the case set up in his letters, entirely different from that which had been set up or even suggested on his behalf in the lower Court.

In the lower Court it was admitted in the 3rd paragraph of the written statement that at the time of sale the estate was attached under proceedings of the civil Court of the 1st February, 1866 (now said by Mr. Tayler to have been at an end by the striking of the case off the Judges's file) and of the 13th February, 1867 (the attachment stated in Mr. Tayler's letter of the 13th April 1869 to have been discovered by him only within the last two days), and the contention then was that plaintiff purchased with full knowledge of the first attachment ; that she bought for Rs. 55,000 an estate which was worth Rs. 88,000 ; that she paid off the decree against Mr. Tayler to serve her own end, and that the maxim *caveat emptor* applied.

In the petition for review, the case set up was, that in Mr. Tayler's belief the attachment had been *ipso facto* withdrawn before

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the sale, by reason of the case in execution having been struck off the file in consequence of the Ranee's having neglected to furnish security in pursuance of an order of the High Court, and that Ahmedoollah was aware of the fact when the sale was completed.

Mr. Tayler said :—

"Your petitioner having just returned to India, has read, he need not say, with pain and mortification, the decision of the High Court in the case of Mussamut Zuhoorun passed on the 19th November, 1868.

"Your petitioner cannot reasonably demur to the decision, based as it is on the defence set up by his native mookhtear, and supported by the evidence which he has volunteered in the case.

"All your petitioner now desires to do is to inform the Court that the statement put in and the evidence given by Enayut Hossein and his creatures are totally false, made and given without the approval, concurrence, or knowledge of your petitioner, and in direct opposition to the instructions given by your petitioner to Enayut Hossein before his departure from India.

"When the High Court is informed that Enayut Hossein is now in the criminal jail; convicted of fraud and embezzlement against your petitioner, and that your petitioner himself has been compelled to come out to India at great loss and inconvenience principally for the purpose of counteracting his nefarious proceedings, it will without difficulty appreciate your petitioner's position."

He then proceeded to state what he called the facts of the case, to the effect that the Ranee attached the estate in February 1866, under the decree; that being about to appeal to Her Majesty in Council, he obtained an order from the High Court that she should be required to give security before execution; that the Ranee not having complied with the order, the decree case was struck off the file; that whatever might have been the strict legal consequence of that order, he confidently believed that it necessarily involved the withdrawal, *ipso facto*, of the attachment; that he truly and conscientiously believed that no obstacle existed to the absolute sale of the property; that he gave instructions to his agent to sell it; the negotiations for sale were carried on for several months, and were finally concluded at nearly the end of the year, when the sale was completed, the deed registered, and possession given, *the Ranee having during the whole of that period failed to comply with the Court's order*, and the attachment being still, as generally believed, removed; that he heard nothing more until a few days before he left India, when Enayut Hossein informed him that the estate had been brought to sale, and that *Ahmedoollah had paid the amount of the decree*;

that in the meantime a correspondence had been going on between Enayut Hossein and the Ranee's Dewan, and that the latter had proposed a compromise of the decree on a cash payment of Rs. 6,000 or 7,000; that when Mr. Tayler heard that Ahmedoollah had, without the slightest intimation or reference to him, paid the full amount, and thus, for his, Ahmedoollah's own benefit deprived Mr. Tayler of the advantage of the reasonable compromise just about to be concluded, he instructed Enayut Hossein to represent the circumstances to Ahmedoollah and effect an amicable compromise with him, if possible, for the amount which, but for the sale under the decree, would have been effected with the Ranee; *that he never disputed nor wished to dispute his liability for the payment made.*

He then went on to say that he left a few days afterwards for England; that when some months afterwards he heard that an action had been brought against him, not then having reason to distrust Enayut Hossein, he concluded that, if he defended the suit at all, it would only be to the extent of the equitable plea above-mentioned *according to the instructions received*; that it was impossible to divine for what purpose Enayut Hossein put in the false and dishonest statement on which the High Court had commented; but he positively asserted that both himself and, to the best of his belief, Ahmedoollah and the numerous other persons cognizant of the lengthened negotiations *were all under the conviction that the attachment had ceased*, and everything was concluded with the greatest openness and publicity; that Ahmedoollah, the purchaser in his wife's name, to the best of his belief, had the same conviction, being, as he believed, perfectly aware of all that had passed; that Enayut Hossein's statement as to the attachment, the value of the estate, *and the information said to have been given to the purchaser, as well as his plea as to the non-liability of Mr. Tayler, were totally and wickedly untrue.*

He prayed that the Court would accept his statement, which he was prepared, if required, to substantiate on oath, and relieve him from the harsh and dishonoring animadversions which it had recorded—a modest request certainly, when in the petition he accused Enayut Hossein of perjury and with having misrepresented to Mr. Kelly, Mr. Tayler's own agent, the effect of the written statement which Mr. Kelly had verified upon oath; and when the petition stated, in direct contradiction of Ahmedoollah's evidence given in the cause upon oath, that he, Ahmedoollah, was, to the best of Mr. Tayler's belief, fully cognizant of all that had passed,

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and was under the same conviction as he that the attachment had ceased.

In his petition and in his affidavit he declared that it was not his intention to dispute his liability for the amount paid. He stated that he directed Enayut Hossein to endeavour to compromise with the plaintiff if he could. He does not state what instructions he left with Enayut Hossein as to the defence to be set up if the plaintiff should refuse to compromise, but merely that, when he heard that the action had been brought, he considered that if Enayut Hossein *defended at all* it would only be to the extent of the equitable plea abovementioned according to the instructions received. This was explained by an additional affidavit, in which he swore that he believed that the only plea which he would ever have allowed to be advanced on his behalf was, that a compromise had been agreed to by the Ranee's Dewan for a sum (as far as he could remember) of Rs. 7,000, and that the plaintiff, by paying the full amount of the decree, without notice, had deprived him of the benefit of the compromise. He also annexed extracts from a correspondence between himself and Mr. Kelly.

In one of the letters to Mr. Kelly he appears to have said :—

"I certainly would not pay Ahmedoolah more than Rs. 7,000, which is the sum I should in all probability have been able to compromise with the Ranee for. He had no right to pay the money on his own authority and without my concurrence, and thus entail on me a liability to the whole without compromise and without the time which the Court would undoubtedly have given me. So if he does not accept this, let him bring his action. But in this matter also, you had better exercise some discretion in consultation with Enayut Hossein and Wilayut Ali."

That letter is dated 3rd May, 1867. The plaintiff's suit was not brought before the 3rd December following. Though Mr. Kelly and Mr. Tayler both made affidavits, not one syllable was stated by either of them as to any offer of compromise having been made to the plaintiff. All Mr. Kelly swore upon that subject was, that if there had been a compromise he had funds in hand sufficient to pay Rs. 7,000 or 8,000 to the purchaser.

That no compromise had ever been effected with the Ranee is clear from her proceeding with the execution without any attempt on the part of Mr. Tayler to prevent it. It is clear that no compromise was made with the plaintiff, from the fact that her suit was afterwards brought, and no such compromise was set up as a defence.

The only defence that Mr. Tayler could have set up under these circumstances was, that the attachment was not in force when the sale took place. If he had made that defence, he might have dictated his own terms, for in that case the plaintiff had paid in her own wrong; and no doubt Mr. Tayler would have set up that defence and dictated his own terms, if he had believed that the attachment was not in existence when the sale took place, or that it was superseded by the second attachment; but no such defence was suggested by him either to Enayut Hossein or to Mr. Kelly in any one of his letters. It is also to be remarked that nothing is said either in the petition or in the affidavits as to whether any and what consultation ever took place between Mr. Kelly, Enayut Hossein, and Wilayut Ali, as recommended in Mr. Tayler's letter of the 3rd May 1867.

Mr. Tayler was heard in support of his petition for review, and on the 13th of March 1869 the following judgments were delivered. The Chief Justice said:—

“It appears to me that there is no ground for reviewing the judgment. I have read very carefully the judgment which I delivered in this case, and I see nothing in it which I can retract. I did remark upon the judgment of the Subordinate Judge, but I abstained from expressing any opinion as to whether there was any fraudulent concealment on the part of Mr. Tayler.”

Mr. Justice Dwarkanath Mitter said:—

“I am of opinion that this application ought to be refused.

“It is not contended that the remarks made by me in the judgment, which is now sought to be reviewed, were not warranted by the evidence then before me, nor is it contended that the decree which followed upon that judgment is in any respect contrary to law or justice. But it is urged that the written statement put in on behalf of the petitioner, and the evidence adduced in support of it, were all concocted by one Enayut Hossein, the native agent of the petitioner, contrary to the instructions expressly given to him by the petitioner, and I have been accordingly asked to withdraw certain remarks which I had made with reference to the conduct of the petitioner, as disclosed by the evidence on the record which I had before me when I heard the appeal.

“I do not think that an application of this sort, which does not ask for any substantial interference either with the judgment or the decree which followed upon it, can be legitimately treated as an application for review, and on this ground I decline to entertain it.

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"I wish to add, however, that I should not be justified in withdrawing the remarks in question upon an *ex parte* proceeding of this kind. Enayut Hossein is not before the Court, and so far as the plaintiff is concerned, she is in no way interested in opposing this application, inasmuch as the petitioner is not seeking for any interference with the decree which has been passed in her favor.

"I express no opinion whatever as to the correctness or otherwise of the statements contained in the affidavit filed by the petitioner. I can only say that if the charges brought against Enayut Hossein are true, the petitioner ought to prosecute him upon those charges; and I have no doubt that such a prosecution, when brought to a successful termination, would be a sufficient vindication of his character. As matters stand at present, I cannot, upon an *ex parte* application like this, hold Enayut Hossein guilty of the serious offence with which he has been charged by the petitioner, and this I must do before I can withdraw the remarks in question.

"I wish further to add that I am by no means satisfied with the explanation given by Mr. Kelly with reference to the verification of the written statement. Mr. Kelly says in his affidavit, 'I received from Mr. Tayler a letter, dated from London the 17th April 1867, and another dated from the said place the 3rd May of the said year, and in these two letters were contained instructions for the settlement of the claims of Mussamat Zuhuroonissa, and the purport and substance of these instructions were communicated by me to the said Enayut Hossein. When the suit of Mussamat Zuhuroonissa was brought, the written statement on the part of Mr. William Tayler was prepared by the said Enayut Hossein, and was represented to me as being in conformity with the purport and substance of the instructions of Mr. William Tayler in the said matter, and upon this assurance I verified the written statement.'

"In the first place I remark that the affidavit does not disclose the precise instructions which Mr. Kelly gave to Enayut Hossein in case he, Enayut Hossein, should fail to bring about an amicable settlement, nor does it appear that the letters referred to are very clear on the point. But be that as it may, it appears to me that Mr. Kelly was in no way justified in verifying the written statement in question merely upon a general assurance from Enayut Hossein that it was prepared 'in conformity with the purport and substance of the instructions of Mr. Tayler.' When a gentleman puts in a verified written statement, it is his bounden duty to satisfy himself, by every possible means in his power, that every allegation which is contained in that written statement is in strict conformity with truth; and it

is no excuse whatever for him to say that he is ignorant of the language in which the written statement was drawn up, or that he was generally assured by some one else that everything stated therein was in conformity with his instructions. It may be that Mr. Kelly was misled by Enayut Hossein; but without expressing any opinion upon this point, one way or the other, I do not feel the slightest hesitation in saying that, upon his own showing, the explanation offered by Mr. Kelly is altogether unsatisfactory.

"I reject this application."

Before those judgments were pronounced, the Chief Justice and Mr. Justice Dwarkanath Mitter consulted together upon the subject of Mr. Tayler's application for review. I pointed out to Mr. Justice Dwarkanath Mitter that I did not see how he could revoke his finding upon the issue of fraudulent concealment without virtually expressing his opinion behind the back of Enayut Hossein, of the charges brought against him by Mr. Tayler in his petition and affidavits. I fully concurred with my honorable colleague in the course which he proposed to adopt, and which he did adopt, in the judgment which I have read.

Without setting out the judgment, or even stating the nature of his reasons, Mr. Justice Dwarkanath Mitter is charged with having, on the narrowest grounds of technicality, refused to retract an unfounded and unjustifiable accusation and a slander recorded against an absent suitor without one tittle of evidence to support it; and this though the accusation had been clearly disproved. If this is fair criticism, I confess I do not understand what fair criticism is.

Mr. Tayler, in his affidavit put in on Tuesday last, swears that the several letters written by him were written for the sole and single purpose of removing the stigma which attached to his name in consequence of the remark recorded by Mr. Justice Dwarkanath Mitter, and to prove, by a searching criticism before the public and his friends, that the facts of the case did not warrant such inference. If that is true, Mr. Tayler has far exceeded the means necessary for the end.

To show the animus with which the letters were written, I proceed to read them.

They are all artistically framed, and, like the chapters in some novels, each is headed with a quotation to give some short general idea of what is coming. Some of the insinuations are artfully penned, but there can be no doubt that they are defamatory. It is plain who are the persons alluded to, and what is the meaning, and to quote the

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words of Lord Hardwicke in a similar case [*The St. James's Evening Post Case* (1)] of contempt—

"As a jury, if the facts were before them, could make no doubt, so I, as a Judge of facts as well as of law, can make none."

The first letter, that of the 7th April, begins with a quotation from Shakespeare—

"My reputation, Iago, my reputation."

*Othello.*

"TO THE EDITOR OF THE ENGLISHMAN.

"SIR,—I was in hopes that, long ere this, I might have sent you for publication the proceedings of the High Court in the matter of my application for a review of judgment in the case in which Mr. Justice Dwarkanath Mitter did me the honour to record that I had 'perpetrated a fraud;' but as I have not yet been able to obtain authenticated copies, I do not wish to delay any longer the remarks which I consider myself called upon to make in justice to myself in regard to this *insulting*, and as I shall show, *utterly unjustifiable*, charge.

"Condemnation or censure passed by a Court of Justice on a suitor (if without sufficient ground or reason) is the most mischievous, the most intolerable of slanders. The Judge on the Bench, like the Parson in the Pulpit, has it all his own way for a time; but the Preacher attacks man in general; the Judge deals with the individual. General condemnation hurts no one. Individual censure may be ruin to the object of it.

"I now purpose to show, and that by *clear and unanswerable evidence*, that this dishonoring and unmeasured imputation judicially cast upon me by Mr. Justice Dwarkanath Mitter *has been recorded by him without one tittle of evidence to support it; that it is wholly untrue and manifestly absurd; and I beg you to observe that the learned Judge who placed it on record has not condescended to give one single reason, ground, or argument in support of his denunciation.*

"*If a District Judge had so acted, he would in all probability have been suspended,* or, at all events, subjected to some such ordeal as Mr. Beaufort underwent not long ago! Whether elevation to the Bench of the High Court carries total exemption from responsibility with it remains to be seen."

This is a distinct charge, that the learned Judge had been guilty of such conduct that if he had been a District Judge he would in all probability have been suspended; but where is the promised clear and unanswerable evidence to support it? It not only asserts that

(1) (1742) 2 Atk. 469 (470).

the Judge's conduct was such as to justify suspension, but Mr. Tayler declared that it remains to be seen whether, in consequence of his high position, he will be exempt from responsibility by Government. There was a charge sufficiently grave to justify the Secretary of State in calling for explanation. Was the learned Judge to wait, or immediately to vindicate his honor and his character?

The letter proceeds:—

“The facts of the case, as far at least as they regard this judicial insult, lie in a nutshell.”

Mr. Tayler then proceeds to detail the facts, not as they appeared on the record, on which alone the Judge had to decide, but upon Mr. Tayler's statement. He says—

“In October 1866, I sold an estate then in my possession in the Gya District for Rs. 55,000 to one Ahmedoollah, an old Patna Vakeel, who purchased it in the name of his wife. Nine months after the sale, this estate had been attached by the *delicious, old maid of Ticaree* under the decree which, to her utter amazement and bewilderment, she obtained from the Hon'ble Justices Loch and Norman for Rs. 12,000,—a decree which robbed me of the hard earnings of a year.”

I shall have occasion in another place to refer to this description of the Ranee. I merely ask here, was it necessary for the vindication of Mr. Tayler's character in this matter under consideration? But what was the meaning of the assertion that she obtained that judgment to her utter amazement and bewilderment? What was the meaning of describing the decree as one which had robbed him of the hard earnings of a year? Could any other meaning attach to those words than that the decree was an unjust one? Was it necessary for the vindication of Mr. Tayler's character, with reference to the question whether he had fraudulently concealed the attachment from a purchaser of the estate, to enter into the merits of the decree under which that estate was attached? I should have thought that Mr. Tayler would have been glad to allow all questions as to that decree to be buried in oblivion; for, notwithstanding the Judges did on review, and upon reading a deposition of Mr. Tayler which had been taken irregularly and was not before the Court on the first hearing of the appeal, withdraw certain remarks which reflected seriously upon Mr. Tayler's character, still the ugly fact remained that Mr. Tayler endeavoured in a certain suit against the Ranee, his former client, to enforce payment of a bond which he had obtained improperly from her, and by the doctrine of estoppel to bind

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her to certain untrue statements which had been introduced into the bond.

Mr. Justice Norman in that case made the following remarks:—

“Mr. Tayler, however, raises the issue that his client is estopped by the admission in the bond. There cannot be a greater mistake. Mr. Tayler stood towards the Ranee in a fiduciary position as her confidential legal adviser.” And again—“We think Mr. Tayler is not entitled to recover on the bond, and it must be set aside as improperly obtained from his client.”

The attempt made by Mr. Tayler in that suit to pervert justice by a misapplication of the doctrine of estoppel was not unlike the attempt which was made by him in the suit brought by Mussamut Zuhoorun to pervert justice by a misapplication of the maxim *caveat emptor*. And here I may ask why, if Mr. Tayler believed that the decree passed by Justices Loch and Norman was unjust or erroneous, did he not proceed with his appeal which he preferred to the Privy Council, and which he withdrew before the date of this letter?

The letter continues:—

“After this attachment, she was required by the High Court to give security before her decree was executed, and on failing to comply with the order, *the case of execution of decree was struck off without reservation*. Some time after this, I gave directions for the sale of the estate. The negotiations were conducted with the utmost publicity by my agent while I was at Simla. They were carried on for months together, and finally completed nine months after the case had been struck off.”

This allegation not only contains a false fact, but suppresses the truth. It is false as regards the statement that the attachment was struck off for default of the Ranee. It is a suppression of the truth, inasmuch as the facts stated were not those upon which the Judge decided, and the validity of the attachment, or of the Ranee's right to sell the estate under it, had never been disputed or set up as a defence by Mr. Tayler.

It is not necessary to decide that Mr. Tayler, when he wrote in this letter that the decree had been struck off for default of the Ranee, stated what he knew to be false, but it is a very remarkable fact that it was made after the Judge in his judgment in the intervention case had declared that the case was not struck off for default of the Ranee, and that the precedent which had been cited by the pleader to show that the attachment was invalidated by the striking the case off the file was applicable only to a case in which the decree is struck off owing to the negligence of the decree-holder. That judgment

having been filed as part of the evidence in the suit against Mr. Tayler, that gentleman in his letter brings his case within the rule by the false statement that the decree was struck off in consequence of the Ranee's having failed to comply with the order that she might give security.

It will make the case clearer if I now read the Judge's judgment in the intervention suit, which was put in as evidence in the suit brought by the purchaser against Mr. Tayler, and compare it with these assertions of Mr. Tayler.

"To-day this case came on for hearing in the presence of the pleaders for both parties, and the papers of the case have been taken into consideration. The particulars of this case are as follows:—

"On the 27th January 1866, Ranee Usmedh Kower filed a petition for execution of decree, with a view to realize the costs and interest payable to her under the decree of the High Court, dated 29th April 1865, by Mr. William Tayler. At that time she also submitted a schedule of the properties which she intended to attach, that is to say, a schedule of sixteen annas of *mocurree* right in mouzah Dergaon in Pergunnah Sumai. On the 1st February 1866 an order for attachment was passed by this Court, and also the usual processes were issued and the estate was attached on the 9th March 1866. An order was sent by the Court to the effect that the decree-holder should show cause, within two weeks, why the execution of decree should not be postponed if the judgment-debtor would find sufficient security until the appeal preferred to the Privy Council shall have been decided. On the receipt of the order afore alluded to, this Court passed an order, to the effect that the execution proceedings should be postponed for the time. Also on the 13th March, at the time of the transmission of the return to the superior Court, this Court made this order, that the proceedings for execution of decree should be struck off from the files of pending cases. On the 29th May 1866 an order was received from the High Court, purporting that in the event of tender of sufficient security, the decree in favour of the decree-holder might be executed. In obedience thereto, the case for execution of decree was again numbered on the file. On the 7th December 1866, the security tendered by the decree-holder was admitted, and the property having been again attached, the 2nd February 1867 was fixed for another sale. On the 13th February, 1867, Mussamut Zuhoorun, the objector, filed a petition praying that the property attached might be exempted from sale, because she having purchased the property in dispute under a deed of sale of 11th October, 1866, has been in possession,

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and the purchase in question took place before the second attachment.

"In this case the point for trial is, whether the order of this Court in the matter of striking off the case for execution of decree for the time being from the file of pending cases can be prejudicial to the previous attachment, and render the same null and void.

"The opinion of the Court is, that an order, like the one passed by this Court, cannot be prejudicial to the interest of the decree-holder under the circumstances of the case, and with reference to the fact that the proceedings in execution of decree were thrown out for a short time and no default was committed by the decree-holder in carrying on the case. Hence, as the decree-holder has furnished sufficient security, and the case for execution of decree has been numbered on the file by order of the Court, the parties to this suit have been placed in the same position in which they were at the time of the striking off of the case for a short time. Hence the Court finds that the first attachment has been in existence and in *statu quo*. The precedent relied on by the pleader for the objector, of 3rd May 1855, page 224, can be applicable to a case in which the execution of decree is specially struck off the file, owing to the negligence and default of the decree-holder. Hence, believing that the first attachment did not become null and void, and as the first attachment had taken place prior to the purchase made by the objector, the Court does hereby order that the objection be rejected, and the property attached be sold by auction for the realization of the money decreed."

The letter goes on :—

"Now I ask you, and through you the public, the whole service to which I had the honor to belong, and with which I am still connected by so many ties, and finally I ask the Hon'ble the Chief Justice and the Judges of the High Court to say what was the fraud which I perpetrated in thus disposing of my property?"

I will answer the question. The fraud consisted, not in selling the estate, but in selling it without informing the purchaser of the attachment, receiving the whole purchase-money from her, leaving her subject to have her estate sold under that attachment, and when she had been obliged to satisfy the decree in order to save her estate from sale, refusing to pay her the money which she had so paid, and of which Mr. Tayler got the benefit in satisfaction of the decree; and setting up the doctrine of *caveat emptor* and other similar sham defences. Mr. Tayler was not so innocent as not to know that the fraud charged was not the simple fact of his selling his property.

The letter further says :—

“Is it not, and has it not for years passed been the unvarying custom throughout the District Courts to consider an attachment dead when an execution case has been struck off the file? Will Mr. Justice Dwarkanath Mitter dispute this?”

This question has already been answered by the Judge of Gya, who held that striking off an execution case does not invalidate an attachment unless the case is struck off for default of the decree-holder. The facts in this letter, as stated, bring the Ranee's attachment directly under this category; but they are false, as has been already shown.

Mr. Tayler's letter proceeds—

“On what ground, then, on what evidence, did this Judge in the first instance record this grave accusation? Not on the evidence of Enayut Hossein, my native agent, for *his* evidence was set aside by the Court as unworthy of trust.”

Enayut Hossein's evidence was disbelieved as to the fact that the purchaser was informed of the attachment, and that the amount of it was fixed at Rs. 14,000. The concealment was proved by Ahmedoolah and the other witnesses produced by the plaintiff.

Further the letter goes on :—

“Whatever may have been the dishonesty of his pleading and answer to the suit, where were the materials to justify the charge that I perpetrated a fraud in selling my estate in October 1866?”

Mr. Tayler must know that that was not the charge, and that the fraud alleged consisted of his suppressing the fact of the attachment.

The letter proceeds :—

“And if the original charge is thus shown to be without reason, ground, or evidence, what will be said when it is known that after the solemn affidavits taken by me before the Court, and the full proof I have given of my entire blamelessness in the matter, Mr. Justice Dwarkanath Mitter refuses, on grounds of the narrowest technicality, to expunge his remarks, and tells me that a criminal prosecution against my native agent, if conducted to a successful termination, will be a complete vindication of my character. (I quote from memory of what he said at the time).”

Here again the judgment and the reasons for it are suppressed. I cannot understand what Mr. Tayler's notions of justice are, if he holds that a refusal to act upon a charge of perjury against a man behind his back is a matter of the narrowest technicality.

Mr. Tayler proceeds :—

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"I should certainly have thought that a Judge endowed with those high qualifications which are generally believed to be essential to the due discharge of his duties, would have gladly seized the opportunity, when he found that he had unwittingly and unjustly slandered an absent suitor, to retract his words and expunge them from the record, instead of referring me to a process not only of doubtful issue, but which is actually impracticable in execution, for there is no criminal charge which could be framed against my agent in this case. He cannot be indicted for perjury without the express sanction of the Civil Court. He cannot be charged with false verification, because he induced Mr. Kelly, my English agent, to verify the statement put in his behalf. He certainly disobeyed my instructions, but he fought the case and gained a decree in my favor in the District Court."

If Enayut Hossein was guilty of perjury, as charged by Mr. Tayler, he might clearly have been charged with perjury. Mr. Tayler would in all probability have had no difficulty in obtaining leave to prosecute him. If Mr. Tayler had no evidence to prove perjury, he ought not to have made the charge.

Mr. Tayler continues :—

"On what possible grounds could I frame or conceive a criminal charge against him with the slightest chance of bringing such charge to a successful termination ?

"So the happy sequel is, that I am unjustifiably accused. The accusation is clearly disproved. My accuser refuses to retract, and refers me for vindication of my character to an impossible remedy.

"It is a satisfaction at least that the Honorable the Chief Justice has publicly disclaimed all participation in this cruel wrong."

All that I stated was that I had nothing to retract. I left it to Mr. Justice Dwarkanath Mitter to say what he thought right with reference to his own judgment.

The next letter is that of the 12th April ; it runs thus :—

*"First Fury.*—Thou thinkest we will rend thee, bone from bone,  
And nerve from nerve, working like fire within ?

*Prometheus.*—Pain is my element, as hate is thine !  
Ye rend me now, I care not."

*Prometheus unbound.*

"TO THE EDITOR OF THE ENGLISHMAN.

"SIR,—Two or three days ago, I addressed you on the subject of Mr. Justice Dwarkanath Mitter's charge against me of 'fraud.' What I am now about to relate is an appropriate and somewhat amusing supplement to the narrative. *At the very time* I was in person

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protesting against this insulting and unfounded imputation, what was taking place in the same district and before the same Court in which the attachment of my estate had taken place?

"Listen, and be edified. Some weeks ago, I had myself attached a house belonging to a judgment-debtor against whom I held a decree for Rs. 5,000. The house was worth about that sum. Before the sale, however, my irresistible old maid of Ticaree, who is in dangerous *rapport* with all the Amlah of all the Courts, having a stray claim against me of Rs. 500 for costs, attached my decree for Rs. 5,000."

Here is a direct charge against the Ranee that she is *in rapport* with all the Amlah of all the Courts. Was it necessary for the vindication of Mr. Tayler's character that the discharged mookhtear should turn upon his former client and endeavour to bring her into ridicule and contempt? The lady who is styled "my irresistible old maid of Ticaree" is a lady of rank and position: above all, she is a Hindu widow, a state which Mr. Tayler from his experience must know is one in which she is removed from all worldly pleasure. Is it because she discharged Mr. Tayler from her service, or because she holds some stray decrees against him which she seeks to enforce, that she is to be slandered and ridiculed? Her sex, her misfortune, ought to have protected her from insult and indignities.

I have no doubt that the charge was intended to convey the imputation that all the Amlah of all the Courts in the district are under undue influence exercised over them by her. But even if this was not the meaning of the slander, there was the intention to ridicule; and why was this? Mr. Tayler has positively sworn that the only object of this letter was to vindicate his character. Would he have thus written if he had continued to be the Ranee's mookhtear on a salary of Rs. 500 a month, with extra reward for winning suits? Is this part of the edification which he promises to those who listen? Let me not be misunderstood. I do not charge this as part of the contempt of the Court. I refer to it merely as evidence of Mr. Tayler's *animus*, and to test the credibility of his affidavits.

Mr. Tayler goes on:—

"And now for judicial wisdom! Instead of allowing the sale to proceed, subject to this lien for Rs. 500, which would, of course, have been paid out of the proceeds, to the satisfaction of justice and all the parties concerned, the Judge strikes the case off the file! The Ranee steps in with another decree against the same party, and the house is sold for her benefit!



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Meanwhile my agent at Patna, directly he hears of the attachment of my decree, sends off Rs. 500 in cash and prays for the sale of the house.

"What is the order? Your case has been struck off. *Ergo*, your attachment has fallen to the ground, and another has reaped the fruits of your diligence!"

This judgment is not intelligible, but, right or wrong, it did not justify the aspersions on Mr. Justice Dwarkanath Mitter.

The letter proceeds :—

"Now, just observe how I am dealt with. Because, in the one case I acted in the belief that the attachment of my own property had ceased in consequence of the case being struck off the file, Mr. Justice Dwarkanath Mitter declares I perpetrated a 'fraud'."

Now is this true? Did Mr. Justice Dwarkanath Mitter declare that Mr. Tayler perpetrated fraud because he acted in the belief that the attachment had ceased in consequence of the case being struck off the file? The fact was not before him when he delivered the first judgment. His reasons for not withdrawing the remarks were given in his judgment in review.

The letter continues :—

"Because, in the Court of Gya, my case of execution had been struck off the file (and that inexcusably), I am robbed of Rs. 5,000 on the ground that the attachment had ceased.

"Thus justice, like the sword of Ali, strikes me at one and the same moment with both edges of the redoubtable Zoolf-i-kar, and each time, as was Ali's pleasant custom, with a shout of insult and derision.

"At the voice of Mr. Justice Dwarkanath Mitter down goes my reputation; on the dictum of the District Judge away goes my money; both Judges acting on grounds diametrically opposed to each other."

What was meant by the words "shouts of insult and derision" with reference to Ali's sword, except that Mr. Justice Dwarkanath Mitter, who was compared to one of the edges, insulted and gloried in his insult.

Mr. Tayler proceeds :—

"With all respect to the majesty of the Ermine, I cannot but think that such instances of human frailty should teach our Judges, whether high or low, the melancholy lesson that after all they are but fallible mortals, and at least make them pause before they aggravate the wrong of an erroneous judgment by the far greater wrong of wanton insult and unfounded aspersion."

The last letter is dated 13th April 1869; it commences thus :—

"*Dogberry*.—Come you hither, Sirrah ; a word in your ear, Sir ; I say to you, it is thought you are false knaves.

*Borachio*.—Sir, I say to you, we are none.

*Dogberry*.—Well, stand aside. 'Fore God, they are both in a tale,

Have you writ down that they are none ?

*Much Ado about Nothing.*"

Here let me ask how it was necessary for the vindication of Mr. Tayler's character to introduce *Dogberry* into the scene ?

"TO THE EDITOR OF THE ENGLISHMAN.

"Sir.—Will you allow me a few more last words about the late assault of Mr. Justice Dwarkanath Mitter, and forgive me for again referring to the irrepressible 'Ego'. Thackeray's pithy defence of egotism is, that if a man tread on my corns, I am the sufferer, and who so well as myself can describe my woes ? But this matter has public as well as private interest ; others have corns, and there are more than one Mitter who may tread on them.

"But what I am now about to represent is a new incident in the case, and one which renders the Judge's accusation so thoroughly absurd that I am bound to give it publicity.

"The only conceivable ground hitherto supposed to exist for casting a stigma upon me was that the Judge sold my estates *under the former attachment*, and therefore that that attachment did exist at the time of my private transfer of the estate.

"This could not really alter the case as far as my 'fraud' was concerned, because, even if he had done so, he would have acted in direct opposition to the established practice, and it was quite enough for my moral absolution to show that I believed, and was justified in the belief, that the attachment had ceased. No judicial '*ex post facto*' eccentricity could alter or affect this state of things.

"But I have within these two days ascertained that even this little homeopathic globule of justification does not exist ! but that the Judge, before he brought the estate to sale, *directed a new order of attachment, thus showing by his own proceedings that he also deemed the old attachment to have become null and void.*"

Here there is again falsehood and concealment ; falsehood in representing that the second attachment was a new incident in the case, and concealment in keeping out of sight the fact that in one defence set up to the suit, the validity of the attachment or of the sale under it was never questioned. The question was, admitting

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the validity of the attachment and of the right to enforce it by sale of the estate, whether the plaintiff knew of it at the time of sale, and if not, whether Mr. Tayler knew of it and fraudulently suppressed or concealed it. The discovery of the fact of the second attachment, even if not known to Mr. Tayler before, could not affect the question whether he fraudulently concealed the first attachment, or the fact of the first attachment continuing in force. But it is clear that this attachment, stated to have been discovered by Mr. Tayler only two or three days before writing the letter, was a matter known when the written statement was put in on behalf of Mr. Tayler, and was actually referred to in the 3rd paragraph as the proceeding of the 13th February 1867, and was also decided by the Judge of Gya not to have affected the first attachment. The Judge speaks of the property having been again attached: of the intervenor's objection that she purchased before the second attachment, and he decided that the first attachment did not become null and void by reason of the second attachment. So much for Mr. Tayler's discovery.

The letter goes on :—

"Thus the infinitesimal peg upon which Mr. Justice Dwarkanath Mitter suspended his insulting imputation subsides into space !

"The confident and uncompromising tone of his accusation had deceived even me, and I had hitherto concluded that he had at least thus much of fact to justify his anathema.

"But it now appears that he made no enquiry whatever as to whether the sale took place under a fresh attachment, or not!! before he thus vilipended me."

There was no necessity to enquire, because the matter was no part of the defence set up.

The letter concludes :—

"We have all heard or read among the mysteries of human nature of that strange idiosyncrasy which enables some men to detect, by a certain internal irritation, the presence, though unseen, of a *cat*. It appears to me that of late years some such element of anti-feline irritation must appertain to my unhappy person, for there is a certain class among the official principalities of Bengal who, directly I am brought into contact with them, appear to be at once affected by an overpowering internal excitability, which affects the understanding even of the wise and good, and intensifies the folly of the foolish, but at the same time always issues in one result—injury, insult, or wrong to myself.

"When the true history of mesmeric repulsion is unravelled, perhaps the cause may be traced."

Can any one doubt, after reading the context, the reference to the judgment of Mr. Justice Loch and Mr. Justice Norman in the first letter, that the words "official principalities" are intended to include the Judges of the High Court, or some of them, and to accuse them of a want of impartiality, fairness, and courtesy in all cases in which Mr. Tayler is concerned as a suitor, which always result in injury, insult, and wrong to him?

I will read a passage or two from Lord Hardwicke's judgment in a similar case.

Lord Hardwicke said (1):—

"Nothing is more incumbent upon Courts of Justice than to preserve their proceedings from being misrepresented; nor is there anything of more pernicious consequence than to prejudice the minds of the public against persons concerned as parties in causes before the cause is finally heard.

"It has always been my opinion, as well as the opinion of those who have sat here before me, that such a proceeding ought to be discountenanced.

"But, to be sure, Mr. Solicitor General has put it upon the right footing, that, notwithstanding this should be a libel, yet unless it is a contempt of the Court, I have no cognizance of it. For whether it is a libel against the public or private persons, the only method is to proceed at law.

"The defendant's counsel have endeavoured two things—*1st*, to show that this paper does not contain defamatory matter; *2ndly*, if it does, yet there is no abuse upon the proceedings of this Court, and therefore there is no room for me to interpose.

"Now, take the whole together, though the letter is artfully penned, there can remain no doubt, in every common reader at a Coffee House, but this is a defamatory libel."

The Lord Chancellor then stated, with reference to the course which had been followed in that case of alluding to the persons libelled by the initial letters of their names, that—

"All the libellers of the kingdom know now that printing initial letters will not serve their turn, for that objection has been long got over."

He then proceeded:—

"It is plain therefore who is meant; and as a jury, if this fact

(1) (1742) 2 Atk. 469 (470).

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was before them, could make no doubt, so as I am a Judge of facts as well as of law, I can make none.

"I might mention several strong cases, where even feigned names have been construed a libel upon those persons who were really meant to be libelled.

"I shall take notice but of one, and that is the case of Mrs. Dodd, who printed a letter abusing the late King, under the name of *Merriwee's Sophy of Persia*; it was tried before a jury of gentleman of great honor, who were so well satisfied of the real meaning, that, notwithstanding the whole was concealed under fictitious names, they found the publisher: guilty.

"Next, as to the expression in the paper, that '*there were even here in England some gentlemen of note and character who did not scruple to turn affidavit men,*' Mr. Solicitor General has insisted this may be taken in a good sense as well as a bad one, because a man who swears true, is as much an affidavit man, as if he swears false, and the Court should take it *in mitiori sensu*.

"I will not take upon me to say whether, upon an action at law, this could be supported as libellous upon the strict rules.

"But, I believe, there is nobody who is conversant in the proceedings of this Court, but must know that this expression means persons who are ready, upon all occasions, to make affidavits, without regarding whether they have any cognizance of the facts."

The use of the words "a certain class of official principalities of Bengal" cannot deceive the Court. There is no doubt it includes one or more of the Judges of the High Court, and I have no more doubt as to what Mr. Tayler meant by the words "being affected by an overpowering internal excitability which affected the principalities when they came into contact with him, and which always resulted in injury, insult, or wrong to him," than Lord Hardwicke had as to the meaning of the words "affidavit men."

These letters are not fair criticisms: they are slanderous effusions, as regards the Ranee of a disappointed mooktear who has been dismissed from her service, and, as regards the Judge, of a disappointed suitor who has failed in his case.

The charge against Mr. Justice Dwarkanath Mitter, of casting upon Mr. Tayler an unmeasured imputation without one tittle of evidence to support it, was not only false, but false within Mr. Tayler's own knowledge. This I will prove out of his own mouth.

In the letter to the Editor of the *Englishman*, dated 12th February 1869, Mr. Tayler says:—

"I have just arrived from England, and one of the first pleasant

things presented to me has been your paper of December 1st, containing the decision of the High Court in the appeal Mussamut Wuzeerun (appellant) *versus* William Tayler (respondent).

"From this decision I find that, in a suit instituted against me after I had left India, and conducted on my behalf by my native mooktear, Enayut Hossein, the High Court has declared me guilty of fraudulent concealment of attachment (*in its legal sense*) in regard to an estate which I sold.

"I do not complain of this decision, for it is based on statements and evidence put forward by Enayut Hossein *which are quite sufficient to justify the conclusions of the Court, which regards them as mine.*"

Again, in his petition of review, on the 17th February last, Mr. Tayler says :—

"Your petitioner having just returned to India, has read, he need not say, with pain and mortification, the decision of the High Court in the case of Mussamut Zuhoorun passed on the 19th November 1868.

*"Your petitioner cannot reasonably demur to the decision, based as it is on the defence set up by his native mooktear, and supported by the evidence which he has volunteered in the case.*

"All your petitioner now desires to do is to inform the Court that the statement put in and the evidence given by Enayut Hossein and his creatures are totally false, made and given without the approval, concurrence, or knowledge of your petitioner, and in direct opposition to the instructions given by him to the said Enayut Hossein before his departure from India."

Holding this opinion, Mr. Tayler knew that, according to the case as it stood when Mr. Justice Dwarkanath Mitter pronounced judgment, he was fully justified in pronouncing it as he did. Mr. Tayler substituted a fresh state of facts, which was false, and wilfully concealed the real one, and he criticised the judgment with reference to that statement. Was this honest? Was it fair criticism, in good faith, of the acts of a public man?

I could scarcely believe that I correctly understood Mr. Tayler's observations which he made with reference to his letter of the 12th February, and his attempt to reconcile the passage which I have quoted with the slanderous imputations in his subsequent letters.

He stated that when he wrote the first letter he was under the impression that the Chief Justice as well as Mr. Justice Dwarkanath Mitter had imputed fraud to him, but that he had since been gratified by finding from the explanation of the Chief Justice that he had put

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only a hypothetical case ; that if the observations of the Chief Justice had been to the effect which he had supposed, he would have had no cause to complain of Mr. Justice Dwarkanath Mitter, as he would then have been concurring with the Chief Justice, after he had considered all the facts.

I called his attention to the fact that he had reiterated the same thing in his petition for review. He then stated that it was not until after the hearing of that petition that he had heard the explanation of the Chief Justice.

I can scarcely trust myself to characterise this explanation of Mr. Tayler. I wish merely to ask whether it was just and fair or mainly on the part of Mr. Tayler to impute to Mr. Justice Dwarkanath Mitter that which he would not have imputed to the Chief Justice, if he had come to a similar finding. How is it possible that there could have been evidence sufficient to justify the Chief Justice alone, or the Chief Justice and Mr. Justice Dwarkanath Mitter jointly, in imputing fraud, if there was not one tittle of evidence to support the imputation when made by Mr. Justice Dwarkanath Mitter alone?

I have now shown beyond all doubt that there was not a shadow of justification for Mr. Tayler's charges against Mr. Justice Dwarkanath Mitter, and that the public could not have been misled by any criticisms if they had been based upon the truth, the whole truth, and nothing but the truth. I have also criticised what Mr. Tayler has been pleased to style his intellectual and searching criticism, and I have no hesitation in declaring that his letters do not contain fair criticisms, but slanderous assertions and false statements. A fair critic must not misrepresent, and he must not wilfully conceal the truth. He is not bound to "extenuate," but he must not "set down aught in malice."

Mr. Tayler's first object in writing the letters may have been to vindicate his own character, but vindication was not the sole object of all that he inserted in them. Besides, every honest man knows that he has no right to vindicate his own character by reflections upon the character of another, based upon false statements and wilful suppression of the truth. I do not believe that there is an editor of a single journal in this country, or in any other, who, having all the facts before him, would, unless influenced by malice or improper motives, have criticised the judgments of Mr. Justice Dwarkanath Mitter in the way in which Mr. Tayler has had the audacity to write about them.

There can be no doubt that the publication of such letters is a

contempt of Court. It is unnecessary to refer to many cases in support of that position.

"Nothing," said Lord Hardwicke in the case already cited, "is more incumbent upon Courts of Justice than to preserve their proceedings from being misrepresented." It is a matter of the greatest importance that Judges should possess the confidence of the public. Such confidence tends much to the satisfactory administration of justice.

In *Lechmere Charlton's case* (1), Lord Cottenham said:—

"The power of committal is given to Courts of Justice for the purpose of securing the better administration of justice. Every writing, letter, or publication; which has for its object to divert the course of justice is a contempt of the Court. It is for that reason that publications of proceedings which have already taken place, when made with a view of influencing the ultimate result of the cause, have been deemed contempts. It would be strange, indeed, if the Judges of the Court were the only persons not protected from libels, writings, and proceedings, the direct object of which is to pervert the course of justice. Every insult offered to a Judge in the exercise of the duties of his office is a contempt; but when the writing or publication proceeds further, and when, not by inference, but by plain and direct language, a threat is used, the object of which is to induce a judicial officer to depart from the course of his judicial duty, and to adopt a course he would not otherwise pursue, it is a contempt of the very highest order."

In *Crawford's case* (2), Mr. Justice Patteson said:—

"It is objected that the Court could have no general power of commitment for a libel published out of Court some time before. This point has not been expressly decided upon. In *Van Sandau's case* (3) the libel appears to have been published both in Court and out of it. In *Rex v. Almon* (4) there was a very learned judgment by Chief Justice Wilmot, which he intended to deliver, though it was not delivered in fact, the case having been dropped. He satisfactorily shews that a Court of Record has power to punish, by commitment for contempt, a libel published while the Court is not sitting. There must be a choice as to the mode of proceeding; for he says that the punishment may be by indictment or by committal for contempt: he treats it throughout as a matter of election. That may be an answer to the difficulty suggested by my brother Coleridge to Mr. Peacock." (The difficulty suggested was whether a commit-

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(1) (1836-37) 2 My and Cr. 316 (339). (2) (1849) 13 Q. B. 613 (627).

(3) (1845) 6 Q. B. 773.

(4) Notes and opinions by Chief Justice Wilmot, 243, 252—271. See 19 How. St. Tr. 1082, note.



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ment for contempt could be pleaded as an answer to an indictment for the same publication). "We need not, however, determine as to this: it is enough for us to see that the Court has the power; and that is clear law. If that be so, the question whether the particular publication be libellous or contemptuous is clearly, as has been said in many instances, a question for the Court which commits. We have not to enquire into this matter, which has been adjudicated upon by a Court of competent jurisdiction.....The fact of authorship is admitted by Mr. Crawford, who comes forward to avow it, openly and very properly. The construction of the publication was for the Court. We, therefore, cannot interfere unless there has been some error in the manner and form of the proceeding."

In the same case Mr. Justice Erle said:—

"Then is there here a lawful ground for committal? The power of Courts to commit for contempt in this country has been discussed: and it has been established, on good reason, that a tribunal has power to protect itself by committing for a contempt relating to the exercise of its powers. *The commitment here was for a contempt in publishing, while the Court was not sitting, and perhaps at some distance of time and place, a libel on the proceedings of the Court.* In the elaborate judgment to which my brother Patteson has referred, it is shewn that such a publication may have a strong and immediate tendency to paralyze the proceedings of this Court. Such cases may easily be conceived; the propriety of the decision in the particular case is a question for the Court itself."

*In the matter of Thomas James Wallace* (1), a Barrister and Attorney of the Supreme Court of Nova Scotia wrote a letter to the Chief Justice reflecting on the Judges and the administration of justice in the Court. The Court suspended him for it. On appeal to the Privy Council, the suspension was reversed. Lord Westbury, in delivering judgment, said:—

"The letter was a contempt of Court which it was hardly possible for the Court to omit taking cognizance of. It was an offence, however, committed by an individual in his capacity of a suitor in respect of his supposed rights of a suitor and of an imaginary injury done to him as a suitor. It had no connection whatever with his professional character, or anything done by him professionally, either as an Advocate or Attorney. It was a contempt of Court committed by an individual in his personal character only. To offences of that kind there has been attached by law and by long practice a definite kind of punishment, *viz.*, fine and imprisonment. We think there

(1) (1866) L. R. 1 P. C. 233.

was no necessity for the Judges to go further than to award to that offence the customary punishment for contempt of Court."

After Mr. Tayler had been brought into Court, I asked him whether he had caused the letters in question which bore his name to be published. He at first hesitated. I do not state this by way of complaint against him, for he was possibly taken by surprise at the moment, and he almost immediately afterwards did, as I should expect Mr. Tayler or any other gentleman, who had sent a letter to a newspaper for publication would do, he very properly admitted that he was the author of the letters, and that he had caused them to be printed and published. I am not quite certain whether I spoke before his admission of what I ~~should~~ do, or spoke after it of what I should have done, if he had not admitted the publication. My belief is that it was the former, and that I said that if Mr. Tayler disavowed the letters, I should be compelled to send for the printer and publisher of the paper, who was just as liable in point of law to be punished for contempt as Mr. Tayler, or words to that effect. This opinion has been challenged, and I proceed to prove that it was well-founded.

There can be no doubt that the publication in a newspaper of letters like these has in fact a much more injurious effect than the mere writing and sending them to the Editor of a newspaper. If the Editor of the *Englishman* had torn up Mr. Tayler's letters and put them into his waste basket, no great injury to the public, or to any one else, would have been caused. But when they were published in the *Englishman*, they were spread over the country wherever that newspaper had circulation. If the writing of those letters was injurious, the injury was increased a thousand-fold by the publication of them in the newspaper to all the readers of that journal. The printer and publisher of the paper doubtless had no feeling upon the subject. The real guilt of publication was mainly that of the author who sent them to the editor in order that they might be published. Under these circumstances, the Court had its election to punish both the author and publisher of the newspaper, or either of them.

In this case the Court saw no necessity to punish both. They intended to deal only with the author. If the author, when brought into Court, had disavowed the publication, the Court would not have allowed justice to be defeated or baffled. It would have sent for the publisher of the paper, and if he had failed to produce the letters or to bring the case home to the author, the Court would have held him responsible. If the printer of a newspaper publish a letter with

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the name of an author attached to it, he must bear the responsibility if he is unable, when required, to prove that it was published with the authority of the person by whom it purports to have been signed. Notwithstanding all that has been said in the newspaper, I unhesitatingly affirm that that is the course which I should have adopted. I trust that I am firm enough and conscientious enough not to be influenced by anything that has been publicly said upon this subject. If I had intended to punish the publisher, I should have punished him, notwithstanding the remarks which have been made. I did not intend to punish him after Mr. Tayler avowed the authorship, and nothing that has been said would induce me to hold the publisher responsible. I have pursued the same course precisely as that which I should have pursued if no remarks upon the subject had been made in the public newspapers.

Now with regard to the liability of printer, there can be no doubt, assuming that the letters are not fair criticisms. If they were fair criticisms, of course both Mr. Tayler and the publisher of the newspaper were justified in publishing them.

In the case *The St. James's Evening Post* case (1), which I have already cited from 2 Atkyns, the contempt was committed by publishing a libel reflecting upon certain suitors in matters pending in the Court. The libel had been published in the *Champion* newspaper, and also in the *St. James's Evening Post*.

Lord Hardwicke said that there were three sorts of contempt :—

“One was scandalizing the Court itself : another was abusing the suitors : there may also be another contempt in prejudicing mankind against persons before the case is heard. There cannot be anything of greater consequence than to keep the streams of justice clear and pure that parties” (and I may add the Judges) “may proceed with safety both to themselves and their character.”

It was held that the libel was a contempt of Court, and Lord Hardwicke remarked :—

“With regard to Mrs. Read (the publisher of the *St. James's Evening Post*), it is said, by way of alleviation, that she did not know the nature of the paper which she had published, and that printing papers and pamphlets was the trade by which she got her livelihood. But though it is true that this is a trade, yet they must take care to do it with prudence and caution ; for if they print anything that is libellous, it is no excuse to say that the printer had no knowledge of the contents, and was entirely ignorant of its being libellous ; and

(1) (1742) 2 Atk. 469.

so is the rule at law, and I will always adhere to the strict rules of law in these cases.

"Therefore Mrs. Read must be committed to the *Fleet*, according to the common order of the Court upon contempts.

"But as to Mr. Huggonson" (the printer of the *Champion* newspaper), "who is already a prisoner in the *Fleet*, I do not think this any motive for compassion, because these persons generally take advantage of their being prisoners to print any libellous or defamatory matter which is brought to them, without scruple or hesitation.

"If these printers had disclosed the name of the person who brought this paper to them, there might have been something said in mitigation of their offence; but as they think proper to conceal it, I must order Mrs. Read to be committed to the *Fleet*, and Mr. Huggonson to be taken into close custody of the Warden."

In *Crawford's case* (1), which has already been referred to, it was ordered that Robert Fargher, the printer and publisher of the *Mona Herald* newspaper, should attend the Court on 1st February "to answer for unlawfully and contemptuously printing and publishing" an article tending to scandalize and defame the Court. It appeared that Fargher attended and admitted that he was the printer and publisher, and expressed his regret that, in consequence of bad health, he had not given the article the consideration it ought to have had, and regretted that it should have given offence to the Court, and he tendered an apology and offered to publish it in all the insular newspapers. The Court did not accept the apology, but forthwith committed Fargher for contempt of Court. Crawford then stated to the Court that he was the author and was willing to take the responsibility, provided the Court relieved Fargher, but that he would not acknowledge the right of the Court to act in a vague, informal, and summary manner. The Court, however, committed Crawford, and he and Fargher were immediately removed from Court in custody.

In a case reported in 2 Vesey, Senior, page 520, *Cann v. Cann* (2), it appears that :—

Mrs. Farley having been committed to the *Fleet* upon motion of the plaintiff for having published an advertisement in the *Bristol Journal*, relating to the answer in Chancery put in by the defendant, Sir Robert Cann, moved to be discharged, having paid for costs of the contempt and submitted; as also the defendant did, confessing the advertisement was put in at his instance. The plaintiff did not oppose the discharge of Mrs. Farley, and left the

(1) (1849) 13 Q. B. 613 (627).

(2) (1754) 2 Ves. Sen. 520.

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matter to the Court. Lord Hardwicke, Chancellor said, his reason for committing was not only for the sake of the party injured by the advertisement, but for the sake of the public proceedings in Court, to hinder such advertisements, which tend to prepossess people as to the proceedings in the Court. But as on a prosecution for a libel in the King's Bench for publishing a scandalous advertisement, if they confess in what manner it was brought to them and everything about it, that Court takes the matter into consideration to alleviate the punishment; so here, though Mrs. Farley's ignorance of law was no justification for the publishing the advertisement, yet having discovered in what manner it was brought to her with other advertisements, and disclosed everything, it was a ground to alleviate the punishment. Therefore he granted the motion.

In *ex parte Jones*, (1), Lord Erskine, whom no one will venture to charge with having endeavoured to shackle the liberty of the press, said :—

"In this Dedication the object is avowed by defaming the proceedings of the Court, standing upon its Rules and Orders, and interesting the public, prejudiced in favour of the author by her own partial representation, to procure a different species of judgment from that, which would be administered in the ordinary course; and by flattering the Judge to taint the source of justice. This pamphlet has been sent to me.

"As to the printers, as Lord Hardwicke observes, it is no excuse, that the printer was ignorant of the contents. Their intention may have been innocent; but, as Lord Mansfield has said, the fact, whence the illegal motive is inferred, must be traversed; and the party, admitting the act, cannot deny the motive. The maxim '*Actus non facit reum, nisi mens sit rea*', cannot be made applicable to this subject in the ordinary administration of justice; as the effect would be, that the ends of justice would be defeated by contrivance. But upon the satisfactory account, given by three of these printers, though undoubtedly under a criminal proceeding they would be in mercy, (those words in their legal sense meaning amerced) in a case of contempt, though I have the jurisdiction, I shall not exercise it. The other printer appears upon the affidavits under different circumstances. Having made the observation that this pamphlet ought not to be printed, being totally uninteresting to the public, yet he does print it; and, though the *locus penitentiae* was afforded to him, and he was called upon not to print any more, he proceeded, until he had notice of this petition.

“Let the Committee and his wife, and the printer, to whom I have last alluded, be committed to the *Fleet* prison.”

Let me not be misunderstood. I have not cited the above cases as precedents as to the mode in which the Court ought to exercise its discretion. Discretion as to punishment must depend upon the facts of each particular case. I cite the cases merely to show what the law is, and what the power of the Court, not to show what the Court ought to do in the exercise of that power. If a printer were to publish defamatory and contemptuous libels sent to him for publication by a gentleman beyond the jurisdiction of the Court, or libels published in another paper beyond the jurisdiction, or if a printer should refuse to give up the name of the real author of the libel, his case would be very different from that of a printer who, having committed an error, should apologize and give up the name of the author.

I am free to admit that I alone am responsible for all that has been done in this matter, though my honorable colleague does not desire to be relieved from any part of the responsibility. I sat with honorable colleague both on the hearing of the appeal and on the hearing of the petition of the review. I knew him before he was raised to the Bench. I have sat with him frequently as a colleague, and I believe that I have had as good an opportunity as any one of forming a just estimate of his character. Though now speaking in his presence, I may be permitted to say that he is a man of ability and learning, very unassuming, yet high-minded, of a gentle, kind, and amiable disposition, independent and always ready to maintain his opinion so long as he conceives it to be right, and equally ready to abandon it if convinced that it is wrong. He is a man to whom I am sure it would give pain to injure the reputation or to wound unnecessarily the feelings of any one. He is the second native gentleman who by his own abilities has raised himself to the high position of a Judge of the High Court.

I saw the letter of the 7th April on that day, but being particularly engaged I did not read it attentively. On the following Monday, the 12th, I saw the letter of that date, and in the evening, after I returned from Court, I read it carefully in conjunction with that of the 7th, to which it referred. I then considered it necessary to vindicate the honor and character of my honorable colleague and the dignity of the Court; and having heard and believed that Mr. Tayler was about to leave Calcutta for England on the following morning, I wrote to my honorable colleague at a late hour of the night to meet me at 6 o'clock on the following morning. He did

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so, after consulting together we considered it necessary to take proceedings for contempt. We adjourned to the Town Hall, where we were met by the Under-Sheriff and the Registrar, and we ordered a writ of attachment to be issued. I may here remark that, up to the time of our meeting on the Tuesday morning, my honorable colleague had never uttered one syllable of complaint to me regarding the charges that had been made against him. If the character of any other of the Judges had been similarly assailed, I should have thought it necessary to adopt a similar course. But it appeared to me to be especially necessary in the present case, when the attack had been made upon a native gentleman, the only one of his countrymen who had a seat on the Bench of the High Court.

It now appears from the affidavit of the Sheriff's officer that Mr. Tayler intended up to the Monday to leave for England in the steamer which was to sail on Tuesday, and that on that day he was allowed by the Peninsular and Oriental Company to postpone his passage until the next steamer. The letter of Monday, the 12th, could not have been sent to the editor of the *Englishman* later than Saturday or Sunday, at which time Mr. Tayler must have had the intention of leaving the jurisdiction of the Court on the day following that on which the letter could be published, and in all probability he had the same intention at the time when he sent to the editor the letter published on Tuesday, the 13th instant, which we also had before us when we issued the attachment.

There were two modes of proceeding open to us: one by a Rule calling upon Mr. Tayler to show cause why he should not be adjudged guilty of contempt of Court,—the other by attachment, under which Mr. Tayler might be arrested and brought into Court for a similar purpose. If we had gone through the farce of making an affidavit of the facts founded on our own belief, in order to satisfy our own minds that a contempt of Court had been committed and had issued a Rule to show cause, which Mr. Tayler probably considered was the only course which the Court could adopt (for on his being arrested he asked the Sheriff's officer why he had not had notice), if, I say, we had made such an affidavit and issued a Rule to show cause to be served on Mr. Tayler on board the steamer on the eve of his departure, we should have deservedly brought ourselves, and we should also have brought the Court and its process, into utter derision and contempt. If we had asked the Registrar to make an affidavit, he knew no more of the facts than we did. He could merely have sworn that he had seen the letters in the papers with Mr. Tayler's name attached to them, and that he verily believed

that Mr. Tayler had caused them to be published ; and, further, that he had heard and believed that Mr. Tayler was about to leave the jurisdiction of the Court. We had as much knowledge ourselves of the facts without such an affidavit as we should have had with it. We therefore determined to act upon our own knowledge of those facts, which, if sworn to by any one to the best of his belief, would have been sufficient to support a Rule to show cause. There was no private complainant. The charge was made by the Court itself upon its own knowledge of facts, which, if sworn to by any one to the best of his belief, would have made a *prima facie* case of contempt of Court. We concluded that the editor of the *Englishman* would not have published letters with Mr. Tayler's name attached to them, without having had them authenticated, and we were right in our conclusion that Mr. Tayler had caused the letters to be published. The writ of attachment which was issued was not a commitment for contempt, but a process to bring Mr. Tayler into Court to answer a charge of contempt. It was necessary, under the circumstances, not merely to vindicate the honor of the Judge and the dignity of the Court, but also to teach gentlemen like Mr. Tayler that they cannot commit contempts of Court with impunity even though they are about to sail the next day for England ; and also to prove to the public that justice is not to be baffled or defeated by artifice.

I will cite two or three out of many authorities to show that the Court is not powerless in such cases.

In Bacon's Abridgment, Tit. "Attachment," page 386, it is said:—

"An attachment is a process that issues at the discretion of the Judges of a Court of Record against a person for some contempt for which he is to be committed, and may be awarded by them upon a bare suggestion, or on their own knowledge, without any appeal, indictment, or information, for though by the Statute of Magna Charta none are to be imprisoned *sine judicio parium vel per legem terre*, yet this summary method of proceeding, being absolutely necessary to the furtherance and execution of justice, seems to have been long practised, and, is certainly now established as part of the law of the land."

The rule is laid down to the same effect in Comyn's Digest, Tit. "Attachment," A. i., and in Hawkins' Pleas of the Crown, 213.

*In Rex v. Jones* (1)—

"The defendant having treated the process of the Court con-  
(1) (1765) 1 Strange 185.

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temptuously, an attachment was issued against him, without a rule to shew cause, (according to *Salk.* 84) and there being intimations that he relied on the assistance of his fellow workmen to rescue him, the Court sent for the Sheriff of Middlesex into Court, and ordered him to take a sufficient force."

I am now speaking in the presence of a large and enlightened audience, and before a learned and independent bar, a profession of which the members, from their education and habits of mind, have ever been the watchful guardians of the rights and liberties of the people, and the foremost to protect against any arbitrary or unconstitutional exercise of power. If I have exercised tyrannically the powers committed to me (as I have been charged with doing), or if I have exercised them unconstitutionally, I know that my conduct is subject to be criticised by the bar and by the public; but I have no misgivings, because I know that if criticised it will be criticised honestly and fairly, and independently. I claim not to be free from criticism: I am always open to conviction, and if convinced of error, I am ready to acknowledge it.

Before I conclude I wish to say a few words as to the course which has been taken out of doors since these proceedings were commenced.

On the 16th April, whilst this matter was pending, an article appeared in the *Englishman*, which I will read:—

"We are not surprised to find that our views respecting the action of Sir Barnes Peacock, in summarily arresting and dragging Mr. Tayler before the Court for writing to a newspaper, are likely to be shared in by contemporaries who have some influence on public opinion. The *Friend of India* says:—

"Sir B. Peacock stated that the printer and publisher of the *Englishman* also was liable to prosecution,—an opinion which raises an interesting question as to the liberty of the press in India."

"The *Pioneer*, having heard the news of the arrest by *telegraph*, thus comments:—

"If the letters alluded to be those in the *Englishman* of the 7th and 12th instant, and if the fact be that Mr. Tayler has been abruptly arrested by the High Court solely in consequence of having written them, we do not wonder at there being excitement. Such an act would naturally seem to every Briton an act of *presumptuous tyranny*. But we can hardly believe the fact of the arrest, or if it has been made, it must have been made on some other ground than merely that Mr. Tayler challenged and *quizzed* the decision of a Judge of the High Court. Sublime personage as he is, a Judge's judgment is

no more sacred from fair criticism than any other publication, and well for the purity of justice that it is so.' "

Having made the above quotation from the *Pioneer*, the *Englishman* proceeds :—

"*We suspect, that Sir Barnes, if he attempts to carry out his dictum too far, will raise a storm not easy to quell.* There are many people who do not care for the grievances of Mr. Tayler, but who will not brook an encroachment upon their right of appeal to the press concerning the public acts of public men. A Judge's acts are no more exempt from public criticism than those of a Chairman of the Justices."

Again, to show how little the facts of the case were understood, I will read an extract from an article in the same paper, dated the 19th April. It is there said :—

"Attention has been drawn to the fact, which no one, as far as we have heard, questioned, that Sir Barnes Peacock originally held, in the case which seems likely to gain so much notoriety, that Mr. W. Tayler had been guilty of fraud, and that this opinion had been concurred in by Mr. Justice Mitter. The contention raised in Mr. Tayler's letters is, however, that he was afterwards allowed an opportunity of explanation, and that the Chief Justice then acquitted him of fraud, whilst Mr. Justice Mitter moderated his decision in no way whatever."

I have already shown most distinctly that I never did find Mr. Tayler guilty of fraud ; that I had no charge to retract, and that I never did, after hearing his explanation, acquit him of anything.

It would have been well if all the public newspapers had followed the calm and dignified course which in the first article which I have read is reported to have been taken by the *Friend of India*. In that paper the opinion expressed by the Chief Justice was brought to notice, and was treated as one which raised an interesting question as to the liberty of the press in India. That course left the question as to the liability of the printer and publisher open to discussion, after the Court should have explained the grounds upon which it had acted, and had referred to the authorities in support of the opinion which it had expressed. But, notwithstanding the very proper course which had been taken by the *Friend of India*, we were told in a journal published on Saturday evening last that the members of the Fourth Estate had protested against this unexpected attack on the liberty of the press, and that *with happy unanimity they had warmly denounced the action taken by the Chief Justice*. To say that the press had *unanimously denounced*, without waiting for the explanation of

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the Judges, is a libel rather upon the press than upon the Chief Justice.

I have referred to the above articles for the purpose of now declaring publicly that to charge a Judge with presumptuous tyranny for the mode in which he is proceeding in a matter pending before him, or to publish anything respecting that matter whilst it is under consideration, with a view to induce the Judge to alter his course, is a grave contempt of Court. The *Englishman* by publishing the article from the *Pioneer*, has rendered itself as responsible for the article as though it had been one of its own. I am willing to believe that the expressions in the article of the 16th April, to which I have referred, were made without duly reflecting that the matters to which they related were then *sub judice*, though they would not have been justifiable at any time.

I am an unflinching advocate of the liberty of the press. I believe that its freedom is one of the main bulwarks of the rights of the people. I claim no exemption as regards my public acts from the most rigid scrutiny and the most unsparing criticism. All I claim is, that there shall be no misrepresentation and no wilful or unfair concealment of facts; and that those who deny infallibility to the Judges shall not claim infallibility for themselves. I have had no cause to complain of the public press since I have been in this country. Speaking generally, I believe it to be fair, independent, and impartial. There has not, I believe, been a single criminal prosecution against a newspaper since I have had the honor to hold the office of Chief Justice, and there have been only one or two private actions for libel. The press in this country addresses itself for the most part to readers of education and intelligence, men who judge and form opinions for themselves. The press is fair, it is not scurrilous; the public are not captious; and public men do not object to have their public acts freely discussed and fairly criticised. Our Courts therefore are generally free from all complaints against the press, either civil or criminal, on the ground of defamation.

And now I wish to declare publicly and emphatically that the Judges are not, and cannot be, influenced in the discharge of their duty by any attacks made upon them by the press. Nothing that has been said by the press upon this subject, and nothing that can be said, no fear of the threatened storm, can even divert me or my honorable colleague from pursuing that plain, straightforward course which our consciences dictate. No unfair criticisms can disturb my equanimity, nor in the slightest degree affect my happiness. They are based on the consciousness that the honest and conscientious

discharge of my duty has ever been the ruling principle of my life. That is a foundation too strong to be undermined by critics, who attempt to criticise that which they do not understand, or to be shaken by any storms which it is in their power to raise.

I am a servant of the public, and I respect their opinion. If they believe that I have exercised in an arbitrary, tyrannical, or oppressive manner the great powers which have been entrusted to me, or if they believe that I have exercised them unconstitutionally, let them express that opinion in a manner which cannot be misunderstood, and I am ready to bow to their verdict. But I shall not accept the expressions of a few newspapers as the general expression of public opinion. If ever I have the misfortune to lose, whether justly or otherwise, the confidence of the public, I shall be ready to lay down those powers which, without that confidence, I shall be no longer able to exercise for the public good.

And now permit me to conclude in the words of Lord Mansfield:—

“I wish popularity, but it is that popularity which follows, not that which is run after. It is that popularity which sooner or later never fails to do justice to the pursuit of noble ends by noble means. I will not do that which my conscience tells me is wrong, to gain the daily praise of all the papers which issue from the press. I will not avoid doing that which I think right, though it should draw upon me the whole artillery of libels, all that falsehood and malice can invent or credulity can swallow.”

Mr. Tayler was afterwards heard in mitigation and the Chief Justice addressed him as follows:—

William Tayler.—The Court has considered all that you have urged, and it adjudges that you have committed grave contempts of Court in having published the letters of the 7th, 12th, and 13th April in the *Englishman*. I have already fully stated my reasons for holding that those letters were not fair or honest criticisms, but that they were founded upon misrepresentation and wilful concealment of the true state of facts. There can be no doubt that you must have known, when you published those letters, that the reflections which you were casting upon the learned Judge had no reference to the state of facts which appeared before him when he pronounced the judgment complained of but to a new state of facts, which, whether true or false, you knew were not before him at the time. It is unnecessary for me to say whether your assertion that at the time you sold the estate you were under the belief that it was not subject to the attachment in execution of the Ranee's decree, was a wilful misrepresentation or not. You must have known, as I have

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already shown, that the charge which you preferred against Mr. Justice Dwarkanath Mitter, of casting an unmeasured imputation upon you without one tittle of evidence to support it, was false and without any foundation. You knew that, according to the case as it stood, when Mr. Justice Dwarkanath Mitter pronounced judgment, he was fully justified in saying what he did. You substituted a fresh state of facts, of which part, to say the least of it, was false within your own knowledge, and having wilfully concealed the real state of the case you criticised the judgment and founded the charges which you made against the Judge with reference to that statement.

It is not even necessary to show that any part of the misrepresentation was wilful, for, whether it was so or not, you are responsible for it. You knew that the learned Judge could act only upon the facts as they appeared before him at the time, and that according to those facts there was no ground of complaint. It is no justification or excuse to say that you were not in the country when the action against you was defended, and that your agent acted fraudulently in the defence which he set up. If a person undertakes to criticise the acts of a public man, he must take care not to assert that which is not true as the basis of his criticism, and he is bound not to conceal wilfully anything which would show that the criticism is not well-founded.

You have stated in your affidavit that the letters written were written for the sole purpose of vindicating your own character. I have shown that, whatever were the reasons which induced you to write those letters, you introduced into them matters which were wholly unnecessary for that vindication, and which reflected on Mr. Justice Dwarkanath Mitter and others of the Judges. I have also shown the *animus* with which those reflections were made. This affidavit instead of mitigating, rather aggravates the guilt of your contempt. When you were before the Court on Tuesday last, I called your attention to the difference between the statement contained in your first letter and in the grounds of review and the assertions which you made in the letters which you subsequently published in the newspaper. In the former you stated that you had no ground of complaint against Mr. Justice Dwarkanath Mitter, based as it was on the defence set up by your native mooktear, and supported by the evidence which he volunteered in the case. In the latter you charged the learned Judge with casting upon you an unmeasured imputation without one tittle of evidence to support it.

I do not think that you have mitigated your offence by the mode in which you have endeavoured to reconcile those conflicting statements.

You have endeavoured to do so by stating that when you wrote your first letter to the *Englishman*, and when you applied for a review of the judgment, you believed that the Chief Justice as well as Mr. Justice Dwarkanath Mitter had imputed the fraud to you. I have shown in my judgment that if there was not one tittle of evidence to support the imputation when made by Mr. Justice Dwarkanath Mitter alone, there could not have been a tittle of evidence to justify the imputation if it had been made by Mr. Justice Dwarkanath Mitter in conjunction with the Chief Justice. I have no doubt whatever, looking at that statement, that your charge was an unmanly one, and that you made a charge against Mr. Justice Dwarkanath Mitter which you would not have ventured to make against the Chief Justice.

Further, I am of opinion that you have aggravated the contempt by contending that the charge in the last paragraph of the letter of the 13th April was not intended to apply to any of the Judges of the High Court. I have not the slightest doubt that in using the words "official principalities" you did intend to refer to the Judges of the High Court. You say the words had reference to something gone by long ago. But the letter, on the face of it, could not have referred to those bygone acts, as those acts had, and could have, no connection with the charge against a Judge of the High Court. Besides, those transactions occurred many years ago and in the paragraph to which I am referring you say :—

"It appears to me *that of late years* some such element of antife-line irritament must appertain to my unhappy person, for there is a certain class among the official principalities of Bengal who, directly I am brought into contact with them, appear to be at once affected by an overpowering internal excitability which affects the understanding even of the wise and good, and intensifies the folly of the foolish, but at the same time always issues in one result— injury, insult, or wrong to myself."

In one of the letters in which you charged Mr. Justice Dwarkanath Mitter with wanton insult and unfounded aspersion, you introduced the words which I have read, and if they apply to the transactions to which you say they do apply, they have no bearing whatever on the subject, and you have sworn positively that your only object in writing the letters was the vindication of your character. But, whether you had such intention or not, you made use of language which must have conveyed that meaning to others,

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and was such as to lead any ordinary reader to believe that you intended it to apply to at least one or more of the Judges of the High Court. I have no hesitation in saying that the words, in the reasonable and ordinary construction of them, had reference to one or more of those Judges, and charged them with a want of impartiality in all cases in which you were a suitor.

It is a high and serious offence to cast unjust and defamatory imputations on a Judge. Judges are subject to be criticised, but they must be protected from unfounded defamation. Had you been charged in an indictment in England with writing such letters, I cannot think that any less punishment than imprisonment and fine would have been passed upon you, and probably the imprisonment would have extended to a year.

It is not the wish or desire of this Court to impose any excessive punishment on you. You have admitted that you have committed a contempt. I do not say that that has aggravated your offence; it has mitigated it. You no doubt did intend to make charges against the learned Judge, which were not justified by the real facts, but which the public would be induced to believe were well founded, because they were based on misrepresentation, and because you concealed the real state of the case.

Taking all the circumstances into consideration, the Court orders that you stand committed for one month to the civil side of the Presidency Jail, and that you pay a fine of Rs. 500, and that you be further imprisoned till the fine be paid.

You state that you are willing still further to apologise. I have endeavoured to show (whether I have been able to satisfy your mind or not I cannot say) that the charges against Mr. Justice Dwarkanath Mitter were without the slightest foundation. The other charge to which I have referred is equally unfounded; and whatever your intention in publishing that part of the letter may have been, or whatever meaning you intended to convey, you were not justified in using language which would induce an ordinary reader to believe that you referred to the Judges of the High Court. If you think fit to add to the apology which you have already published (and it is for you to decide whether you can conscientiously do so or not) the Court is willing to mitigate the sentence. If, after what you have heard, you state that, upon reflection, you find that the charges which you made against Mr. Justice Dwarkanath Mitter were unwarranted and wholly without foundation, and that you are sorry for having made them, you may do so: and you may add, if you wish it, either that you did not intend to cast any reflection upon any

of the other Judges, or that the reflection cast was unfounded, and if you publish that apology in the *Englishman*, you may apply on Monday, the 3rd of May next, for your discharge on payment of the fine.

On Tuesday, the 27th April, Mr. Tayler addressed a petition to the Chief Justice and Mr. Justice Dwarkanath Mitter, which was sent to the Chief Justice at an early hour in the morning.

A writ of *Habeas Corpus* was forthwith issued by the Chief Justice to the Superintendent of the Presidency Jail, commanding him to bring Mr. Tayler into Court at half-past nine o'clock.

The petition was as follows :

"That on the 24th of April instant, your petitioner was committed for contempt of Court in having caused to be published in Calcutta certain letters in the *Englishman* newspaper relating to a decision of the Honorable Mr. Justice Dwarkanath Mitter in the case noted in the margin, and was ordered to pay a fine to Her Majesty of Rs. 500, and to be further imprisoned until such fine was paid, or until the further order of the Court.

"That the Court was pleased to intimate to your petitioner that, in the event of his publishing in the *Englishman* newspaper a further apology in the terms suggested by the Court, in addition to the apology published by him on the 22nd instant, he was to be at liberty to apply to the Court for his discharge.

"That your petitioner has paid the fine of Rs. 500 imposed upon him by the Court, as will appear from the certificate of the Accountant General of the Court, already submitted.

"That your petitioner has also published in this morning's *Englishman* the further apology required of him.

"That your petitioner is very sorry for having written the letters against Mr. Justice Dwarkanath Mitter, and is also sorry for having made use of expressions which have been considered as reflecting upon the other Judges of the Court.

"That your petitioner can truly say that he never intended to reflect upon the other Judges of the Court.

"That your petitioner's health, which was previously in a weak state, has been seriously affected by the anxieties attending his trial, and by his imprisonment at this season of the year.

"That your petitioner had taken his passage to England, and arranged to leave by the steamer which will leave at 11 o'clock this morning.

"Your petitioner having fully complied with the order of the Court, and made all the reparation in his power, prays that the

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67 of 1868, dated  
19th November  
1868—*Mussamut*  
*Zukoorum* Appellant,  
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remainder of the term of his imprisonment may be remitted, and that he may be forthwith discharged from custody."

Upon taking his seat, the Chief Justice addressed Mr. Tayler to the following effect :—

Mr. Tayler,—The Court has read your petition, which is a very proper one. You have now fully submitted. You state that you have paid the fine, and that you have published in this morning's *Englishman* the further apology required of you. You further state that you are very sorry for having written the letters against Mr. Justice Dwarkanath Mitter, and that you are also sorry for having made use of expressions which have been condemned by the Court as reflecting upon the other Judges; and that you can truly say that you never intended to reflect upon them. You state that your health, which was previously in a weak state, has been seriously affected by the anxieties attending your trial and by your imprisonment at this time of the year; that you had taken your passage to England, and had arranged to leave by the steamer which is to leave at 11 o'clock this morning. You then, after stating that you have fully complied with the order of the Court and have made all the reparation in your power, pray that the remainder of the term of imprisonment may be remitted, and that you may be forthwith discharged out of custody.

You have also forwarded a copy of a medical certificate from Drs. Macrae and Brougham, dated 25th April, in which it is stated, amongst other things, that for the last three months you have been suffering from attacks of recurrent gout with aggravated dyspepsia, from which you have become greatly debilitated; that a prolonged imprisonment, from its depressing influences, would be attended with risk of serious impairment to your health, if not with more grave consequences, and that you ought not to remain in this country a day longer than can be avoided; in fact, that you had been advised to leave India a month ago.

When you were before the Court on Tuesday last you expressed yourself willing to apologize. I then stated that whatever apology might be made, it ought to be published as widely and extensively as your letters to the Editor of the *Englishman*. The case was adjourned until Saturday last, in order to give you an opportunity of publishing in the *Englishman* such an apology as you might see fit; and, without dictating or recommending any particular form of apology, I called your attention to the fact that you had not retracted the charges which you had publicly preferred against Mr. Justice Dwarkanath Mitter.

\* In cases of this nature a proper apology may mitigate, but it cannot wholly excuse or justify, or form a ground for a total exemption from punishment.

On the 22nd April you published an apology in the *Englishman*, but it contained no denial or disavowal of the truth of the charges which you had preferred. The Court, considering all the circumstances of the case, ordered you to stand committed to the Presidency Jail for one month, or until further orders, and to pay a fine of Rs. 500. The month was fixed as the maximum of the imprisonment which, under any circumstances, you were to undergo. A maximum was fixed in consequence of a doubt thrown out in *Cruwford's case* (1), whether a commitment for contempt could be "until further orders," which might amount to imprisonment for life.

It was not necessary to consider whether the usual mode of framing commitments for contempt until further orders, which was the form adopted by Lord Cottenham in *Lechmere Charlton's case* (2), and had been adopted in numerous other cases, could be supported or not. A month was fixed as the maximum, and the words "or until further orders" were added in order to enable the Court to discharge you at an earlier period if you should make your apology complete; and you were informed that you might apply for your discharge on Monday next. You have now made your apology complete and have sent it to this Court under your signature; and you have also published a copy of it in the *Englishman* this morning. In addition to the apology\* which you published on the 22nd instant,

(1) (1849) 13 Q. B. 613.

(2) (1836-37) 2 My. & Cr. 316.

\* The apology published on the 22nd instant is as follows:—

"TO THE EDITOR OF THE ENGLISHMAN.

SIR,—You are no doubt fully informed of the result of yesterday's proceedings in the matter of the charge against me of contempt of Court, for which I was arrested on the 13th instant.

Considering that the fact of my arrest was sufficient evidence that the Court held my former letters to your address to "constitute such contempts," I resolved, after consultation with my friends and my learned counsel, to submit on this point to the decision of the Court; and, as I had never intended to commit, and never thought that I had committed, such contempt, but had written with the sole purpose of vindicating my character, I at once tendered, both orally and by affidavit, a full and unreserved apology both to Mr. Justice Dwarkanath Mitter and the Court at large. But the Hon'ble the Chief Justice, in postponing the case for final orders until Saturday, suggested that I should give the same publicity to this apology as was given to my former letters. In compliance with this intimation, and as my apology is in truth without reservation or stint, I shall be much obliged by your printing this letter, if possible, in your journal of to-morrow.

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you say that you regret to state that, upon reflection, you find that the charges made by you against Mr. Justice Dwarkanath Mitter were unwarranted and wholly without foundation. Further, you declare that you had no intention to cast any reflection upon the High Court or upon any of the other Judges of the Court. The Court has already determined that they could put no other meaning upon the last part of your letter of the 13th April than that it was intended to charge want of impartiality on the part of the Judges in cases in which you are concerned, which always resulted in injury, insult, or wrong to you. Whether you intended it or not you are responsible for publishing words which, in the opinion of the Court, were susceptible of no other meaning. You have been punished for your offence, you have now fully and very properly apologized; and whatever opinion the Court may entertain, it cannot fairly ask or endeavour to compel you to admit that in publishing the letters in the *Englishman* you had any intention or knowledge which, as a gentleman, you disavow.

"The Court agrees with you that you have now made all the reparation in your power, or that the Court could fairly expect, and they do not wish to do anything which would add further pain to the anxiety which you have already undergone, and to the humiliation which you have suffered. You have already undergone sufficient punishment to be a warning to yourself and to others; no additional amount of punishment could add to that warning. The Court sat at this early hour, not for their own convenience, nor for any other reason, except that you might proceed to England by the steamer, and that you might not be detained in this country an hour longer than was absolutely necessary."

In the course of his address, the Chief Justice pointed out that there was a clerical error in the letter published in the *Englishman* this morning, which made Mr. Tayler say that he had no intention

There is only one other point which it is desirable to mention.

The Hon'ble the Chief Justice remarked that he did not observe in my apology anything which showed that I retracted my charge against Mr. Justice Dwarkanath Mitter. In accordance with this suggestion, I beg to say that I have no hesitation whatever in retracting all such expressions and observations as may have been deemed by the Court to be improper or contemptuous; and I may observe that I had intended my apology to include such retraction.

I hope that this public expression will be satisfactory to Mr. Justice Dwarkanath Mitter, and meet the suggestion of the Hon'ble the Chief Justice.

W. TAYLER."

Calcutta, 1st April 1869.

to cast any reflection "upon any of the Judges," instead of any of the *other* Judges, which were the words of the original apology signed by Mr. Tayler. He said this for the sake of the Court and for the sake of Mr. Tayler. The Court, after Mr. Tayler's apology with regard to Mr. Justice Dwarkanath Mitter, could not fairly ask him to say that he never intended to cast reflection upon any of the Judges, nor could Mr. Tayler, as a gentleman, have made such a statement.

Mr. Tayler wished to be allowed to say that the application for his discharge from imprisonment which had been made to the Lieutenant Governor was made by his friends without his sanction. He was fully aware that the Lieutenant Governor had no power to interfere in a case like the present, or to order his discharge from imprisonment.

The Chief Justice said that he had seen the medical certificates which had been forwarded to His Honor the Lieutenant Governor, that without entering into the question whether the Lieutenant Governor had the power or not, he thought that the certificates were not such as could have justified the exercise of it. They were not even such as would have induced the Court to discharge Mr. Tayler before the end of the month, if the additional apology had not been published; but they were certificates which might very properly influence the Court after that apology had been made. Even without those certificates, the Court would have had no desire to inflict any further pain on Mr. Tayler, after he had so fully submitted, and had made so complete an apology, and presented so proper a petition.

Mr. Tayler was then discharged.

A. T. M.

*Before Sir Barnes Peacock, Knight, Chief Justice and Mr. Justice Macpherson.*

#### IN THE MATTER OF BANKS AND FENWICK.\*

*Contempt of Court—Jurisdiction—High Court—Contempt not committed in Court—Contempt pending suit—Advertisement for demonstration against Judge—Fair criticism—False statements sent to press—Apology—Immunity from*

\* Charge of contempt against the Printer and Publisher of the 'Englishman.'

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Banks and Fenwick.*Punishment—Indian Penal Code (Act XLV of 1860), Sec. 499, Excep. 2—  
'Opinions in good faith.'*

The High Court has power to proceed by way of contempt in a Court sitting in its Original Civil jurisdiction and not on the Crown side of the Court, even when the contempt is not committed in Court or during the pendency of a suit.

If the contempt is one which does not come under the provisions of the Indian Penal Code, there is nothing to prevent the High Court dealing with it as a contempt and if it is contempt punishable under the Penal Code, the Court can try it itself, but upon the understanding that the punishment to be inflicted, will in no case exceed that provided in the Penal Code.

Any fair criticism is justifiable and is not a contempt, if expressed in good faith.

An expression of opinion in good faith is a criticism.

If anonymous letters are sent to the press containing false statements, the press is responsible for them if the name of the author is not given up.

False statements published in newspapers are not fair criticisms.

No one has a right of appeal to the press by bringing false accusations founded on wilful mis-statements.

Advertisement for a demonstration against a Judge for acts done in Court, is a contempt.

A man cannot claim immunity from punishment from the fact of having made an apology for his offence.

The expression 'opinions in good faith' in Exception 2 of section 499 of the Indian Penal Code, means that in order to express an opinion in good faith, the person who holds it must have taken care and attention in forming it.

Charge of contempt against the Printer and Publisher of the 'Englishman.'

The charge was that having published certain letters and advertisement in the newspaper 'Englishman'; he was guilty of a contempt of Court.

*Messrs. Kennedy, Paul and Evans* appeared to show cause.

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Upon this case being called on,

*Mr. Kennedy* stated that he appeared for *Mr. Banks* with *Mr. Evans* and *Mr. Paul*. There was one point in which a little difficulty had occurred with respect to the form in which the affidavit of *Mr. Banks* was to be drawn up. It was stated that the Court was sitting in its Original Jurisdiction, but it did not appear which jurisdiction, whether Civil or Criminal.

THE CHIEF JUSTICE.—The Court is sitting in its Original Civil Jurisdiction. The matter is not on the Crown side of the Court.

*Mr. Kennedy* stated he would then proceed to put in the affidavit of *Mr. Banks*.

THE CHIEF JUSTICE.—I suppose there is no doubt as to the signature of *Mr. Banks* to that document.

*Mr. Kennedy.*—I believe the affidavit has been sworn before an officer of the Court. I will read the affidavit.

THE CHIEF JUSTICE.—An office copy of Mr. Banks' declaration has been put in under the seal of the Court, but there is no evidence to show whose signature it is.

*Mr. Kennedy.*—The first paragraph of the affidavit removes all difficulty about that, wherein he states,—

"I am the printer and publisher of the *Englishman*."

THE CHIEF JUSTICE.—Very well; but there is one other matter which I wish to mention before going on to the affidavits. I want to see the subscription list which Mr. Clarke has been subpoenaed to produce. I do not wish to see the names of the persons who have subscribed, but I wish to see for what purpose the subscription was raised. If the gentlemen who subscribed preferred that their names should not be known, I have no wish to make them known, but I want to know whether they subscribed to that fund in order to assist Mr. Tayler, or whether it was with the view of denouncing the judgment of the Court.

*Mr. Kennedy* stated that the subscription list had no particular heading stating for what purpose the subscription was being raised.

THE CHIEF JUSTICE.—I want to know whether they came in in pursuance to the advertisement, or whether they were accompanied by letters stating the reason for which the money was sent.

*Mr. Kennedy.*—In many cases letters accompanied the subscription.

THE CHIEF JUSTICE.—If the gentlemen who have subscribed will come forward and acknowledge having done so, they may do so with perfect freedom so far as any proceedings against them are concerned. If they like to avow having subscribed they may do so; if not, I have no wish to enquire into the matter.

*Mr. Kennedy.*—I have a copy of a list headed, "List of subscribers to the Tayler Fund who agree to their names being given up." Application was made to the subscribers of the Fund, and every one applied to consent to give up his name. I don't know whether there was any particular heading to the list when it was first started, but there are many gentlemen in Court who are prepared to state the circumstances under which they sent in their subscription.

THE CHIEF JUSTICE.—I do not wish to press for the names of those gentlemen, but if they like to give them up themselves they may do so.

*Mr. Kennedy.*—Captain Fenwick is in this position. He is not justified in refusing to produce the list of subscribers which he has

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been required to produce by a subpoena of the Court, and it could not be any breach of faith on his part, as it was originally intended to publish the names. After, however, the observations of your Lordships, it was considered that to publish their names would be to place them in a somewhat invidious position, and they were accordingly written to and requested to be allowed to give up their names, and to which all who have replied have consented. As I understand it was not merely their rupee that these gentlemen were sending in, but an expression of their opinion.

THE CHIEF JUSTICE.—I propose to put in the *Englishman* newspaper of the 21st instant, merely to show a report of what took place with regard to Mr. Tayler's case, and merely for the purpose of the proceedings. I do not propose to treat this as a contempt of Court, but merely as explanatory of other parts of the proceedings. There is another paper of April 16, which contains an article with reference to an article which has appeared in the *Pioneer*. I do not wish to put this in as forming part of the contempt, as I have already expressed in my judgment in Mr. Tayler's case my willingness to allow this to pass, and I will not now go back from what I before stated, and treat it as a contempt. I merely put this paper in for the purpose of showing, with reference to the subsequent articles, what was the object of those subsequent articles. The words—"we suspect that Sir Barnes, if he attempts to carry out his dictum too far, will raise a storm not easy to quell. There are many people who do not care for the grievances of Mr. Tayler, but who will not brook an encroachment upon their right of appeal to the Press concerning the public acts of public men. A Judge's acts are no more exempt from public criticism than those of a Chairman of the Justices"—were merely to be read as introductory to and explanatory of, the other articles.

Mr. Kennedy.—I will read the affidavit of Mr. Banks in the first instance, and probably after reading it, Your Lordships may be induced to take another course in the matter.

Mr. Kennedy then read Mr. Banks' affidavit as follows:—

"IN THE HIGH COURT OF JUDICATURE AT FORT WILLIAM  
IN BENGAL.

(In the Matter of Alexander Banks.)

I, Alexander Banks, of Hare Street, in Calcutta, Printer, make oath and say:—

First.—I am the Printer and Publisher of the *Englishman* Newspaper.

\* *Second*.—That George Roe Fenwick is the Editor of the said newspaper, and without his orders and directions no articles are inserted therein.

*Third*.—That the said George Roe Fenwick has signified to me his intention to appear before this Honorable Court and admit that the articles, notices and advertisements, referred to in the rule *nisi* herein, were inserted in the said newspaper by his directions.

*Fourth*.—That I exercise no control, whatever over the contents of the said newspaper.

*Fifth*.—That, although I *read* some of the said articles when handed to me for publication as aforesaid, I did not in any way consider their meaning or purport, but inserted the same simply on the direction of the said George Roe Fenwick, as is my habit.

*Sixth*.—That in inserting the said articles, notices and advertisements, I did so *bona fide*, not actuated from any improper feeling or motives towards the Honorable The Chief Justice or any of the Judges of this Honorable Court, nor did I intend, by such insertion, in any way to, excite contempt against the proceedings of this Honourable Court.

A. BANKS.

Sworn, this third day of May 1869, before me.

A. L. Piddington,

Commissioner.

MR. KENNEDY.—Captain Fenwick is now present in Court. Of course, if, in the strict principle of law, Mr. Banks has been guilty of contempt in what he has done, I do not put this forward as any ground for his discharge, but Captain Fenwick is in Court, ready to bear the brunt of what was in reality done by him, or by his order, and not leave it to others to bear.

THE CHIEF JUSTICE.—Captain Fenwick in doing that, has only done that which every honourable gentleman who fills an editor's chair would do, in not allowing a publisher of a paper to take the consequence of articles written and published by his orders, by not coming forward to avow the authorship. He was prepared to withdraw the rule as against the printer, and treat Captain Fenwick as the person against whom the rule was issued. The argument might go on however on the printer's rule.

Mr. Kennedy said that what he thought the Court might do would be to make a fresh order returnable immediately, in order that there might be no delay. Captain Fenwick was in Court, and the case might be allowed to proceed as against him, but there would be this difficulty that Captain Fenwick wished to explain some matters

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and had expected to have the opportunity of doing so as he had been called on a subpoena.

THE CHIEF JUSTICE said that Captain Fenwick might put in an affidavit for any purpose he pleased ; the arguments might be proceeded with and the affidavit put in at some future time.

*Mr. Kennedy* remarked that, as he would probably have to occupy the Court for a long time, the affidavit could be sworn in the meantime. Captain Fenwick authorised him to say that he admitted having published the articles in question.

THE CHIEF JUSTICE.—Then a new order for a rule can be made out, similar to the one made in the case of *Mr. Banks*. (*To Captain Fenwick*) I believe I understand that you admit your responsibility.

CAPTAIN FENWICK.—Certainly, my Lord.

*Mr. Kennedy* in proceeding to address the Court against the rule spoke as follows :—This is a case, in which I appear with very great pain and anxiety, because it is hardly possible to conduct it properly without appearing to be guilty of a thing—contempt of your Lordship,—which would be the last I should wish.

THE CHIEF JUSTICE.—I shall of course understand all you say, *Mr. Kennedy*, as only said in the discharge of your duty as an advocate.

*Mr. Kennedy*—Thank you, my Lord ; but at the same time I would wish it to be understood that in any remarks that may fall from me, I do not desire that they should appear to be addressed to the same Chief Justice as the Chief Justice of *whom* I speak.

THE CHIEF JUSTICE.—I think *Mr. Kennedy*, that it is a pity to resort to any fiction in the case, (a laugh.)

*Mr. Kennedy*.—I shall be obliged, then, to criticise the judgment of the Chief Justice, I hope, without exceeding the limits of discretion. The first question is, whether, whatever the former state of the law was with respect to contempts of Court or matters of defamation of Judges or their judgments, it now applies, or can be applicable, to your Lordships. I understand this rule to be issued under the civil jurisdiction of the Court, and yet it appears to me that a case of contempt of Court should be tried under the criminal jurisdiction.

THE CHIEF JUSTICE.—I am quite ready to admit that if you please ; it is quite indifferent, and immaterial at which side of the Court the case is tried.

*Mr. Kennedy*.—I submit, my Lord, that you have only the power to commit a prisoner for contempt of Court under the Criminal

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Jurisdiction. In the case of *Wellesley* (1), it is clearly shown that contempts of this class are criminal offences and are so dealt with by the Court. By this it is quite clear that, by trying contempt under the criminal jurisdiction, your Lordships are only exercising Jurisdiction under the Indian Penal Code, Act XLV, 1860. No Court can exercise jurisdiction with respect to contempt, except it is contempt by that Code. Cases, if they amount to infraction of that Code, must be tried and punished by that Code, as is mentioned in the 30th section of the Letters Patent:—"All persons brought for trial before the said High Court of Judicature at Fort William in Bengal, either in the exercise of its original jurisdiction or in the exercise of its jurisdiction as a Court of Appeal, Reference or Revision, under Indian Penal Code, charged with any offence for which provision is made by Act XLV of 1860, called the Indian Penal Code, or by an Act amending or extending the said Act, which may have been passed prior to the publication of these presents, shall be liable to punishment under the said Act or Acts and not otherwise."

I think, my Lord, this must be a misprint as to the word extended, which should be "excluded." Chapter 10 defines the offences which shall be deemed contempts of Court. As a general rule the heading is not part of an Act, but in this case it is different, inasmuch as the body of the Chapter acknowledges and incorporates the different headings as in section 6—"Throughout this Code every definition of an offence, every penal provision, and every illustration of every such definition or penal provision, shall be understood subject to the exceptions contained in the chapter entitled "General Exceptions," though these exceptions are not repeated in such definition, penal provision or illustration." I think that this marks intention to include the headings or titles in legislation as part of the Act. Not the same in the case of the marginal notes, which are added afterwards, subsequently to the Act being passed. Then we find in that chapter certain definitions most important here. In section 21 we find that "public servants" include a Judge, and the whole of Chapter 10 is a Code to guide the Court in breaches of duty to public servants, and provide for that class of contempt most generally dealt with by the Courts, that is for the most part known in Chancery and common law. There it is stated that that contempt consists in disobedience to the laws of the Court, obstruction of its business, or interference with, or prejudice to its decisions and judgments.

Those are the classes of acts which are punishable as contempts

(1) (1831) 2 Russ and M. 639.

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under the provisions of the Code of Criminal Procedure, and none of these come up to or in any way near, the matter in respect of which Mr. Fenwick is now charged. There is an additional provision in this matter in the 228th section of the Penal Code which enacts as follows:—

“Whoever intentionally offers any insult or causes any interruption to any public servant, while such public servant is sitting in any stage of a judicial proceeding, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.”

And in the 499th section of the Code the following words occur:—

“Whoever by words, either spoken or intended to be read, or by signs, or by visible representations, makes or publishes any imputation concerning any person, intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person.”

Now, as far as I understand it, the accusation which is made against Captain Fenwick—the contempt of Court which he is now called upon to answer—is a contempt of having defamed a person, but there is an exception with respect to that class of defamations.

THE CHIEF JUSTICE.—You mustn't understand that we assent to all you are saying, Mr. Kennedy.

*Mr. Kennedy.*—No, my Lord, I don't assume assent from your Lordships' silence. I am grateful for that silence, for the case is one of peculiar difficulty, and which might be rendered more so if I were to be interrupted.

THE CHIEF JUSTICE.—Pray don't understand that because the Court is silent, it agrees with all you are saying.

*Mr. Kennedy.*—No, my Lord. I perfectly understand that.

Mr. Kennedy then went on to say that the second exception to the 499th Section of the Indian Penal Code was as follows:—

“It is not defamation to express in good faith any opinion whatever respecting the conduct of a public servant in the discharge of his public functions, or respecting his character, so far as his character appears in that conduct, and no further.”

Now, what I submit is this, that a case having occurred, in which certain matter published amounted to defamation—and defamation of acts done in the capacity of a Judge—that defamation, being a defamation on the acts of a Judge, becomes of itself included in the exception which I have just read. It must be defamation within the terms of the Penal Code, and no defamation which was punishable

under the provisions of the Penal Code as defamation is punishable by this Court in any other way ; for it is clearly laid down in the 2nd section of the Code, as well as by the 30th clause of the Charter, that "every person shall be liable to punishment under this Code, and not otherwise, for every act or omission contrary to the provisions thereof, of which he shall be guilty within the said territories on or after the said 1st day of May 1861."

It is clearly stated in the Penal Code what is punishable as defamation, and with regard to the exception to which I have referred, your Lordships are bound to read it as if the word "judge" is substituted for "public servant" ; and nothing expressed in good faith on the public functions of a Judge could be punishable as defamation. It seems to me that it is impossible, without destroying the utility of the Penal Code—without making it a trap—to hold that the license of legislature has been given to the Court, empowering it to say that though this charge against Captain Fenwick may not be tried in the ordinary course of law by an indictment for defamation, yet that it may be dealt with in an extraordinary way, and under a course which does not give him the ordinary protection of a Jury—the protection of the ordinary tribunals—and a scale of ascending tribunals, with an appeal from each, but leaves him wholly at the mercy of the person on whom the defamation has been uttered. I do not contend that any defamation which does not come within the 499th section, as explained and limited by the exception to which I have just referred, can be such an offence as to empower the Courts to deal with it either by its ordinary procedure or in an extraordinary way, by treating it as a contempt of Court. That explanation must be given by your Lordships to the language of the legislature in its description of what it calls and deems to be contempt of a public servant—among whom are included judges—and that of itself would limit the operation of the Court dealing with such contempts as would come within that part of the statute, as offences punishable only as defamation under the ordinary provisions of law.

Therefore, my Lord, if jurisdiction can be exercised it can only be exercised when the Court comes to the conclusion as to the expression. I mean when that expression is not in good faith. Even so I would submit that the power to punish summarily for contempt has been taken away by the express language of the legislature. Whether that jurisdiction ever existed, or whether it be taken away, I contend that it was never imperative for the Court to exercise it, even in those worst of times when newspapers were considered as vermin, to be hunted down as

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pests, and marks for scorn; instead of as they are now considered, members of society, important members to be protected instead of arraigned before a tribunal, considered as the 4th estate of the realm. Even then it was a discretionary matter with the Court how to deal with libels which were likely to bring into contempt the proceedings or judgments of that Court. Your Lordship had recently delivered a judgment (1) in respect of the same question. No doubt that any authority that could be produced from the proceedings of any English Court would not be unknown to your Lordship, yet no exercise of such a power is in that judgment shown to have occurred. I have also carefully searched the reports and text books, but am unable to find a single instance of a Court in England having exercised such a jurisdiction, by way of trying or punishing contempts of Court, which were merely defamatory libels on the Court or the Judges, when no proceedings were pending, and which therefore could in no way prejudice or influence the Court in such proceedings. The observations with which your Lordship finds fault were published by Captain Fenwick subsequent to the proceedings against Mr. Tayler. These proceedings were concluded on the 23rd April, Saturday, and, as I understand, your Lordship is not now proceeding against Captain Fenwick for those articles published on or before the 16th April. Even in those, I am sure, you do not attribute to Captain Fenwick the folly of supposing you weak or wicked enough to alter your judgment in the pending case for fear of an article in the newspaper.

THE CHIEF JUSTICE.—Although it is not so material to the present portion of your argument, I want to call attention to the explanation in section 52. You must, I think, import that explanation of “good faith” into the construction of this exception—where it speaks of opinions in good faith, it must mean, in order to express an opinion in good faith, the person who holds it must have taken care and attention in forming it.

*Mr. Kennedy.*—I think, my Lord, that if he truly holds the opinion he is justified in expressing it. Care and attention in expressing an opinion are different from the care and attention demanded in forming that opinion, and the words ‘good faith’ are only connected with the expression.

THE CHIEF JUSTICE.—I understand you to say that a person may express an opinion in good faith, though care and attention have not been taken in forming that opinion.

(1) (1869) 26 C. L. J. 345

*Mr. Kennedy.*—That is the only construction which can reasonably be given to the language. The power of proceeding by summary powers for contempt, even if vested in the Court, is a discretionary one. There are other courses than the one now adopted open for vindicating the integrity of the Courts and the honor of the Judges, and I submit that the discretion which is vested in your Lordships is not properly exercised by proceeding in a summary way for contempt of Court. The discretion properly exercised by the Court would be to fall back on the long list of precedents brought forward in the judgment in *Mr. Tayler's case* (1), and if the dignity of the Court has been in any way brought into contempt, to direct an officer of the Court to file a criminal information. In every case in England which I have been able to discover since the earliest period of any reference respecting contempts of this class, that course has always been adopted. No doubt the Courts in England are vested with a summary power to treat certain cases of contempt, without which, indeed, it would be impossible for the ordinary course of Justice to be proceeded with—without which no regularity could be observed—and to shield the officers of the Court in the execution of their duty. The power even went so far that where contemptuous words were used towards the Court, or the writ of the Court, at the time the writ was being served, punishment for contempt was inflicted; but from the earliest time down to the present, I am not aware of one single case where a person has been punished as for a contempt of Court, for a libel referring, not to a suit then pending, but subsequent to its termination. It is stated by Chief Justice Campbell in a well-known book—but I could hardly call it an authority—"Campbell's Lives of the Chief Justices, Vol. II, page 298 Note." "That if a prosecution for a libel on Judges be necessary, the preferable course is to proceed by information or indictment so as to avoid placing them in the invidious situation of deciding when they may be supposed to be parties." He says, this is in reference to a judgment written but not delivered, in which Chief Justice Wilmot had laid down the existence of this power; but it would seem that this only states that there may be cases where it may be necessary to exercise this summary jurisdiction in order for the safety of the Courts. Mr. Kennedy then referred to the case of the *King v. Faulkner* (2), and continued—I do so merely to show that there has been so far as the memory of the Courts at home reach no exercise of its jurisdiction in this

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(1) (1869) 26 C. L. J. 345.

(2) (1835) 2 Mont. &amp; Ayr. 311 (330).

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manner. Baron Park, whose name stands as high as any who have ever worn the ermine in the Courts of Westminster, in the course of the argument in the *King v. Faulkner* (1), was unable to refer to any case of it save that of the *King v. Almon* (2), but in that case of the *King v. Almon* (2), referred to there, no judgment was ever given; and in no case can it be shown that, when the Courts proceeded for contempt against a person subsequent to the termination of the proceedings, they did so summarily: but there are many such cases cited, and they have all been proceeded against by information.

I would submit that there is no analogy between this case and the cases where a person brought himself into contempt by direct communication, whether oral or written, with the Court, or an officer, as in the case of *Lechmere Charlton* (3). I submit there is a great difference between writing outside the Court and coming into the presence of the Court and insulting it, or using improper language, or being guilty of improper behaviour there. There is no case in England where contempt has been noticed after the close of the proceedings. As to the propriety of your Lordships exercising a jurisdiction which Courts in England have never exercised for the last 100 years, I may refer to the case of *Birch v. Walsh* (4).

Here was clearly a case of contempt, yet the Court exercised a discretionary power. There is an enormous difference between proceedings pending in a Court, such as the Court of Chancery, and a Court where a Jury might be influenced, or witnesses deterred, or the course of justice paralysed by the publication of such libels. The jurisdiction is given for the purpose of protecting the Court, parties, and suitors when the ordinary remedy might be too slow. This difference is, as I say, most material, and in the enormous lapse of time there is not one case, like the present, in which the English Courts have proceeded as for a contempt? There have however been cases in which the smaller Courts in the Colonies have adopted severe measures with regard to contempts, and in which this summary jurisdiction has been exercised. In a case which came before the Privy Council in 1866, an appeal by one *Lawrence Macdermott* (5), the Court which had punished him, gave him leave to appeal against the sentence of six months' imprisonment and a fine, for article inserted in a local journal. When *Macdermott's case* (5) came

(1) (1835) 2 Mont. &amp; Ayr. 311 (330).

(2) (1765) Wilmot 243.

(3) (1836-37) 2 My. &amp; Cr. 316.

(4) (1846) 10 Ir. Eq. 93.

(5) (1866) L. R. 1 P. C. 260; 4 Moore P. C. N. S. 110.

before the Privy Council, it was held that there was no jurisdiction to interfere with the decision of the Colonial Court, but the permission to appeal marked the disapprobation of the Privy Council.

THE CHIEF JUSTICE.—I believe another case is reported, *Rainy v. Justices* (1), where the Privy Council, although deciding that they could not interfere in such a matter, yet reduced the amount of fine from £150 to £60, not as an Appeal Court, but as a mere Matter of Finance. I looked into *Macdermott's* case (2) before passing sentence in *Mr. Tayler's* case (3), in order that the fine might be below that which the Court allowed in that case.

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*Mr. Kennedy* continued — In *Macdermott's* case, (2) one of the contempts for which he was charged was with reference to matters past and gone. It appears from the report that on the 2nd April an *ex-parte* order was obtained against Macdermott for publishing certain scandalous articles reflecting on the administration of justice in the Colony of British Guiana. On the 5th April another article appeared, which was also treated as a contempt, which might be held to refer to a pending proceeding, but the first article, which appeared to be one of a highly defamatory nature, wholly referred to past proceedings. The ultimate decision of the Privy Council on appeal was that it had no power to interfere. The mere fact that there is no appeal to the Privy Council against an order for contempt ought of itself to make your Lordships feel that it is not exercising a proper discretion on your part in proceeding in the matter of an article defamatory of your Lordship the Chief Justice himself, by a summary jurisdiction in a Court from whose decision there is no appeal, and in a Court in which the Chief Justice's opinion, even if differing from the rest of the Court, must prevail. Unless it appeared that there was likely to be the gravest possible consequences to the administration of the justice, the proper course to be adopted would be not to have proceeded by a summary process for contempt, but by proceeding, if the Court came to the conclusion that this case is one which calls for animadversion, against Captain Fenwick in a constitutional way, when Captain Fenwick would be brought before a Jury, and if any questions of law arose, they might be reserved for the consideration of a higher Court. That is a point which I have felt in duty bound to bring before your Lordship's notice, and no doubt it would have due weight. Here, in this

(1) (1852) 8 Moore P. C. 47.

(2) (1866) L. R. 1 P. C. 260.

(3) (1869) 26 C. L. J. 345.



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Court, Captain Fenwick is brought forward to answer a charge of contempt, the nature of which is that he is likely to bring the administration of justice in this country into contempt—that he is likely to weaken the faith of the people in the due and true administration of justice. This case is one which must go to the public as a matter of fact. I am unable to see any reasons which lead to the conclusion that a summary proceeding should be used instead of the constitutional one. There may be such reasons, but it will be difficult to induce the mass of the people to believe in them. If the Court were to exercise this jurisdiction, it will go forth to the world that a Court, from whose decision there is no appeal, has held that these articles of Captain Fenwick were not written in good faith. Would that be satisfactory to the public? Will a decision like that strengthen the faith of the public in the administration of the justice in the same way as a decision of a jury will. The Courts of law in this country are held in too high estimation by the people for any newspaper article to have any damaging effect on that estimation. Whether a Jury convicted or acquitted Captain Fenwick of defamation, or of not having written those articles in good faith, would have very little effect upon the public mind, but the case of a Judge, from whose decision there is no appeal, deciding a case in which he is a person interested, must have the effect of shaking the confidence of the public in the tribunals of the country. I much regret that it should have this effect, but I fear that it is an almost necessary consequence. If no other course was open to the Court; if it was imperatively necessary for the Court to proceed in the manner it had done, I would be the first to say, regardless of any outside opinion which might be entertained outside,—“Go on, and exercise your jurisdiction.” The jurisdiction is vested in the Court for the benefit of the mass of the subjects and must be exercised. It is however not a necessary jurisdiction, but a discretionary one, and one which should be exercised with the greatest care, especially when in the course of upwards of 100 years not a single case can be cited to show that the Court at Westminster had exercised this jurisdiction. That is the most elementary feeling and principle that has been engrained into the minds of all people which prevents Judges from deciding in cases in which they are directly interested. In the case of *Dimes v. Grand Junction Canal* (1), Lord Cottenham’s judgment was held by the House of Lords not capable of being supported, merely because he had an infinitesimal interest as a shareholder.

(1) (1852) 3 H. L. C. 759.

THE CHIEF JUSTICE.—The same thing would apply if the same were said to the Judge in Court.

*Mr. Kennedy.*—No, my Lord, I think not. I do not think so; for when an insult is offered in Court, it calls for summary proceedings and instant animadversion, in order to preserve order and regularity; but even then discretionary power is used. What can the Judge do but use summary administration; but even then the offender is in general only put in prison until he submits, or until the rising of the Court. Cases of contempt of this character pertain more to disturbance than defamation, as in the case of mad people in the presence of the Court who use insulting and defamatory language. They are not cases in which the Judge is seeking to vindicate his own character; they are not personal matters, but are analogous to cases of writ-serving, where the served occasionally use bad language. Could the Judge have personal motives there in punishing such an offender? I think not. I would ask now, what reason can there be in not employing the process of criminal information or to what reasons will the adoption of this course be attributed? The Court cannot wish to punish Captain Fenwick if he has not done wrong. Has the Court no confidence in the administration of justice by a Jury who have taken an oath of impartiality? Is it impossible to obtain a Jury from among the community of Calcutta, who are to be relied on when they have taken a solemn oath to convict the offender should they find him guilty? Surely their verdict would be satisfactory to the ends of justice. On the other hand, the fact of the Court trying a case in which the Judges were personally interested, would have a more important effect on the mind of the public than could be possibly produced by any newspaper articles or writings. In the case of a great personage in Her Majesty's dominions, which I dare say your Lordships remember, when he tried a person against whom he had brought accusation, the case created a sensation not easily forgotten. I cannot forget the expression of public opinion on that occasion. When your Lordship wishes to preserve the dignity and character of the Court, I conceive that in the wording of the rule the words "to be dealt with in such other way" means criminal information and trial by a Jury.

THE CHIEF JUSTICE.—I did not mean that:

*Mr. Kennedy* quoted the case of *Dimes v. Grand Junction Canal* (1), as to the undesirability of a Judge trying his own case.

(1) (1852) 3 H. L. C. 759.

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In the case of the *Queen v. Justices of Tyrone* (1), Judge Fitzgerald made some very strong observations as to the impropriety of Judges trying cases in which they had the slightest interest.

This is an undoubted and an unquestioned principle. This is not a case like that of Lord Cottenham and the *Grand Junction Canal Company* (2) in which it was supposed that an *animus* existed in the mind of the Judge from the trivial interest he held in the matter as a shareholder in the Company. There are two cases which I have discovered, in which it is laid down that a Judge can not take part in the trial of any case in which he was an interested party. One of these cases (3) is reported in Coke upon Lyttleton, p. 377B, in which a Judge named Richel wished to decide a case in his own favor, but was overruled by three other Judges. And so the case was dismissed "*ex assensu omnium justiciariorum prater querentem Richel.*" Leaving then the Judge, who had tried his own case, to be a warning to others, as Coke puts it, he came to a very interesting case, if authentic, but he got it from a high authority, (8th Henry VI, page 18). That was an action against one Chase, the Chancellor of Oxon, for trespass, where the defendant pleaded in abatement that he was Chancellor of Oxford, and Clerk of Oxford, and that by letters patent the case could only be tried in his own Court. Upon demurrer the plea of abatement was overruled (4). In that case the counsel for the defence, being much pressed by the Court to produce a precedent for a man sitting as Judge in his own case and giving judgment against himself, replied he knew of but one. It was that of a Pope, who had committed a grievous crime, and the cardinals came and said to him "*Peccasti*", and he answered "*Judica me*" and they said "*Non Possumus : : quia caput ecclesie Judica teipsum.*" And the Pope gave judgment "*Judico me cremari et fuit combustus.*" So, having sentenced himself to be burnt, he was burnt and became a saint, and so it clearly appears that a man may be a just Judge in his own case. In the present case there certainly is that enormous objection—which I have tried to impress upon the Court—that, however, it may be, it will be impossible for the public to divest its mind of the fact, that where a course like this has been adopted from the wish that the trial might be withdrawn from that more proper tribunal—the consideration of a Jury. There is another point of jurisdiction to which he wished to draw the Court's attention, and that was that the whole law of commitment for contempts had arisen antecedent to what he might call the *Magna*

(1) (1860) 12 Ir. C. L. R. 91

(2) (1852) 3 II. L. C. 759.

(3) (1401) Y. B. 2. II. IV. 11; Co Lit. 141 a.

(4) (1430) Y. B. 8 II. VI. 18.

• *Charta* of the English Press. Some time ago it made little difference whether a person charged with libel was tried by a Judge alone, or by a Judge and Jury, as it was the Judge alone who was to determine whether the article was defamatory or not, and the Jury were obliged to confine themselves to the simple issue as to whether the person charged did or did not publish the defamatory matter. That however, was not the law now. One must look to the present state of the law with respect to libels, and must consider that the whole jurisdiction has been withdrawn from the Court. To the Jury, and the Jury alone, is submitted the power, but the Court may interfere if the Jury decides to be libel that which is clearly not libel, or it can mitigate, but not increase, the punishment with which the Jury visits such libel. Newspapers are now-a-days looked upon as the natural and proper correctors of those who are in high power. All hold that in England we have one broad principle on which, in a great measure, rests our superiority. I mean the liberty of the Press, which does not exist elsewhere. In England, the Press acts as the hand and eye to the public and to the executive. I refer now to *Wason v. Walters* (1).

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Lord Chief Justice Cockburn there says :—"The law of libel has only gradually developed itself into a satisfactory state: for the liberty of a public writer to comment upon the conduct and motives of public men has only recently been recognised. Comments on Government, on Ministers and Officers of State, on members of both Houses of Parliament, on Judges and other public functionaries, are now made every day, which, half a century ago, would have been the object of "ex-officio" informations, and would have brought down fine and imprisonment on publishers and authors. Yet who can doubt the public are gainers by the change, and that though injustice may often be done, and though public men may often have to smart under the keen sense of wrong inflicted by hostile criticism, the nation profits by public opinion being thus freely brought to bear on the discharge of public duties."

This shows what a change has taken place in the state of the law and public opinion. Lately the Lieutenant-Governor, whose conduct has been subjected to severe and even hostile criticism, especially on the subject of the Orissa famine, took no notice of such criticisms. Had he done so, the writers of such criticisms would have been equally liable with the present offenders to a Criminal Information. Is it wise for the High Court °

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to object to criminal information, and to claim for itself a higher prerogative, when it is perfectly clear that other functionaries had not that right? These are all the observations I wish to make on this part of the case, and I will now shortly proceed to call your Lordships' attention to another point, and ask whether there is sufficient authority for saying—especially having regard to the then state of the law with regard to indictments for libels,—that the Court has ever had jurisdiction to treat as contempts of Court matters which have occurred outside the Court after the termination of the case, which brought no one into personal collision with the Court, and which are in no way injurious except in being in some way defamatory. All the cases cited on the point are cases which have been actually decided in England, and in all these cases criminal informations have been issued. I have not been able to discover a case in which an English Judge has exercised this jurisdiction, although there have been cases of Colonial Judges having done so. In the case of *Faulkner* (1), alluded to before, and reported in Montague and Ayrton, it is held that, whatever might be the right or the power of attachment, the Judge who professed to exercise the power had not the power. In examining the law in this matter, it strongly recalls to my mind the observation of Lord Denman in the case of the *Queen v. O'Connell* (2).

"That there were three kinds of Law: Common Law, Law by Statute, and Law taken for granted, and that the amount of accepted legal opinion which fell under the last head far exceeded the amount comprised under the two first heads."

The law could not be better expressed than it was there, in one of the greatest judgments which have ever been delivered by any member of the House of Lords.

THE CHIEF JUSTICE.—But it was proved that the law taken for granted was not good law.

*Mr. Kennedy*.—It was proved to be irreconcilable to clear legal principles.

The Court then adjourned for a quarter of an hour for refreshment. Upon its re-assembling,

*Mr. Kennedy* proceeded with his argument. I refer the Court to the judgment of the Lord Chancellor, in *St. James Evening Post* (3) and will now ask your Lordships to direct your attention to the case of *Birch v. Walsh* (4), in which the Master of the Rolls in Ireland

(1) (1835) 2 Mont. & Ayr. 311

(2) (1844) 11 Cl. & F. 155 (373).

(3) (1742) 2 Atk. 469.

(4) (1846) 10 Ir. Eq. 93.

adopted the language of Lord Hardwicke and went through the whole of the classes of contempts punishable by the Court in its high prerogative power. Mr. Kennedy again quoted the class of contempts referred to, and proceeded to speak with regard to the third point—that of an inference of an intention to obstruct the course of justice. This, I submit, could not be called scandalising the Court. The term “Scandalising,” as I understand it, is a part of the class of contempt in which, when the process of the Court was served, opprobrious language of some description was used. It does seem to me that in cases of this description, where the contempt consists of an attack on the Judges, that the Court invariably ought to proceed on criminal information. Mr. Kennedy then quoted the case of the *King v. Watson* (1), and went on to say—I do not think that any Court at this day would proceed against a man for expressing an opinion, even if it were expressed without forethought. There are several cases in which criminal informations have been brought against persons for libels upon persons filling high judicial positions, but if a shorter and more simple remedy had been open to them, that course would certainly have been pursued. In your judgment your Lordship starts with that case (2), which lays down three different kinds of contempt. That is exhaustive of contempts which are liable to punishment, and yet the Judge is not in favor of public rights to the exclusion of rights of the Court. It is hardly possible to put any other construction on that judgment. I think the only other case having any bearing on the present is *Van Sandau's case* (3), which is alluded to in the course of *Mr. Tayler's case* (4) in which the contempt was actually committed in the presence of the Court, and the summary jurisdiction was resorted to for the purpose of preserving order.

The two cases referred to by Starkie, page 481, are stated to be libels on the Court of Queen's Bench; whereas it would appear, on looking into them, that they had nothing to do with the court of Queen's Bench at all, but it was a libel on Dr. Middleton (5). How it occurred that the King's Bench could be mixed up with a Doctor of Divinity I am at a loss to comprehend. We find in Fortescue 201, that the libel was a libel on a Doctor of Divinity, and that the libel was contained in the dedication of a book. I have heard that “Divinity doth hedge a King,” but here the “King's”

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(1) (1788) 2 T. R. 199.

(2) (1742) 2 Atk 469.

(3) (1846) 1 Ph. 605; 1 DeG. 55.

(4) (1869) 26 C. L. J. 345.

(5) (1606) 5 Coke 125 a.

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Bench" seems to hedge a Doctor of Divinity. Then the only other case was in Starkie, 582. These are the only two cases which state that such jurisdiction has ever existed. In more modern times we find a case (1) in the Queen's Bench. Now in this case it appears on the face of the Report that Crawford attended the Court as a spectator and auditor and that he commented in the *Mona* newspaper, and that it appears the Court was adjourned and the man was committed.

THE CHIEF JUSTICE.—That case appears to be a libel out of Court.

*Mr Kennedy.*—It does not appear that the suit was not still pending. It appears that the article was contemptuous, and that its publication was calculated to paralyse the proceedings of the Court. I believe your Lordship was personally present, but it appears to me that as it is reported that appears to be the gist of the affair. Next I come to *Wallace's case* (2) which was a letter directed to the Judge for the purpose of influencing him in the discharge of one of the duties of the Court. This letter was most insulting, and accused him of altering Minutes of the Court. This was clearly during a pending suit. I forgot to remind your Lordships that in the Mofussil, except in those Courts established by Royal Charter, they would have no power to exercise such a jurisdiction as I mentioned before, as the administration has carefully withdrawn all such power—Act 25. 1861, section 1863.

No Court except those established by Royal Charter has any jurisdiction, and when so established it has only that power to a similar extent of Rs. 200 fine. Yet they would want it more than this Court; in fact one would have thought it would have been necessary in those Courts. Assuming that your Lordships are not convinced on the points on which I have argued, I will go on to prove that your Lordships cannot treat this case as one of contempt, that is to say, as a case punishable summarily, but that you can only try it by Jury as a case of defamation under the Penal Code.

THE CHIEF JUSTICE.—If the contempt is one which does not come under the provisions of the Penal Code, there is nothing to prevent the Court dealing with it as a contempt, and if it is a contempt, punishable under the Penal Code, the Court can try it itself,

(1) (1849) 13 Q. B. 613.

(2) (1866) L. R. 1 P. C. 283.

but upon the understanding that the punishment to be inflicted will in no case exceed that provided in the Penal Code.

*Mr. Kennedy.*—What is the charge against Captain Fenwick in the present case?

*THE CHIEF JUSTICE.*—He is charged with having published certain letters and advertisement in the newspaper, and that in doing so he has been guilty of a contempt of Court.

*Mr. Kennedy.*—What I want to know is whether I am to direct myself to the question as to whether the articles in question were calculated to do harm or to injure the reputation of the Judge.

*THE CHIEF JUSTICE.*—Not alone that. The advertisement for a demonstration against a Judge for acts done in Court is, in my view, a contempt.

*MACPHERSON, J.*—I think *Mr. Kennedy*, you may argue first as to whether the letters, &c., written come within the meaning of the word defamation according to the Penal Code, and then whether they are a contempt of Court.

*THE CHIEF JUSTICE.*—I put it that the advertisement calls for a demonstration of public opinion, and is a defamation as well.

*Mr. Kennedy.*—With respect to the defamation, I want to understand what your Lordships hold.

*THE CHIEF JUSTICE.*—If it is a criticism for which, within the meaning of the Penal Code, he could not be indicted, it is not a contempt. Any fair criticism is justifiable and is not a contempt, if expressed in good faith. According to the 52nd Section of the Penal Code a *bona fide* criticism is not a contempt.

*Mr. Kennedy.*—There may be some difference between the words "expression of opinion" and the word "criticism," although perhaps the simple meaning of the word "criticism," is nothing but an expression of opinion, but if any person were to say "So and So's judgment was wrong," that could hardly be called a fair criticism.

*THE CHIEF JUSTICE.*—I call an expression of opinion in good faith a criticism.

*Mr. Kennedy.*—If writers in the discharge of their public duty were to be obliged to support every portion of what they wrote with reasons, they would be in a hard case.

*THE CHIEF JUSTICE.*—I don't mean with their own reasons, but it would not do for a writer, in the case of a man convicted of murder, to say, without giving the evidence, that the Judge and Jury had convicted an innocent man.

*Mr. Kennedy.*—Suppose it was not in a newspaper, but an ordinary person had said so,

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THE CHIEF JUSTICE.—If he said so in Court that would be a contempt of Court. I am willing to hear you if you wish to argue that would be an expression in good faith on the conduct of a public servant. Suppose in a case in which there was a conflict of evidence a newspaper was to say that “the Judge and Jury have convicted an innocent man; the man has been hanged and it is a cruel injustice,” would that be justifiable?

*Mr. Kennedy.*—If made in good faith it would. Suppose the case of a person who had been in Court and paid great attention to the case and came to that conclusion, or suppose that one of a minority of a Jury, as in the Mofussil, where a unanimous verdict is not required, differed from the other jurors, and the man tried was condemned to death, could it be said that, although he did not give his reasons, yet that if he said “in my opinion that man is as innocent as any in Court, and yet he has been sentenced to death,” that the statement was not made in good faith?

The offences charged against Captain Fenwick are two; *first*, in having consented to act as treasurer to the fund, and in having given notice of the formation of a fund, intended to offer an opportunity to people who entertained an adverse opinion to the Court in *Taylor's matter* (1), of giving an expression of their opinion by paying their Rupee. Possibly the law of conspiracy still prevails in the country, and after the case of the *Queen v. O'Connell* (2), it is hard to say what is not conspiracy.

THE CHIEF JUSTICE.—But those counts were held to be bad.

*Mr. Kennedy.*—I will not state what is and what is not of the nature of a conspiracy, as that is an offence not triable under this particular jurisdiction; and since the introduction of the Penal Code I doubt whether it is triable at all in India. The paragraphs which I presume to be taken as the contempt of Court was this:—

“During the whole of Sunday and yesterday great excitement prevailed throughout Calcutta at the severe sentence pronounced by the Chief Justice on Mr. W. Tayler. We understand that a public subscription has been opened to pay the amount of the fine, subscriptions being limited to one rupee each. We shall be happy to take charge of any subscriptions to such a fund,—the demonstration not being at all intended to express any justification of Mr. Tayler's conduct, but to show rather the sentiment which exists in the breasts of all Englishmen against a too severe use of power. Precedents in law and the forms of justice may be cited in favor of Sir Barnes

(1) (1869) 26 C. L. J. 345.

(2) (1844) 11 Cl. & F. 155.

Peacock's action in the matter, but the universal shout of indignation with which His Lordship's sentence, sitting as he was, as Prosecutor, Judge and Jury upon his own wrong, has been received, sufficiently justifies an appeal to the public. Five hundred men having the pluck to put down their rupee each, in proof of their protest against the cruel sentence awarded by the Chief Justice, and as an earnest of their determination to support their right of appeal to a free Press will be a lesson which Sir Barnes Peacock will not be likely soon to forget."

I confess that I can find nothing there that amounts to a contempt of Court. I find a desire rather to find out what public feeling really was in the matter. In your judgment your Lordship said, "I am a servant of the public. If public opinion is unmistakably expressed I will bow to it. But I will not take the voice of a few papers for the voice of the public." It really seems difficult to ascertain how public opinion could be better expressed than by this Rupee subscription. It was your Lordship's, and not Captain Fenwick's, suggestion as to the expression. The proposal for subscription did not come from Captain Fenwick, as I learn, on the contrary, he has been led into it. This appears on the face of the notice itself.

From this it is clear that the suggestion was made to him, as he had taken great interest in the *Taylor case* (1), and surely this could not be taken as a contempt of Court, when his action was merely the result of your Lordship's challenge to the public opinion of the community in Calcutta fortified by a threat.

THE CHIEF JUSTICE.—I used no threat. I said I shall be happy to lay down.

*Mr. Kennedy.*—Yes, my Lord, it is a threat when you speak of depriving the community of your deep learning and the brilliancy and impartiality so long the brightest ornament of the Bench. This subscription may be regarded as an indication that public opinion thought your Lordship was in error. This public opinion may be very wrong, but still the feeling existed, as it would amongst all Englishmen, and I believe it also existed here amongst the members of the Bar, that it would have been better had Mr. Taylor been tried by a Jury. In one word, there was a feeling of dissatisfaction at the proceedings against Mr. Taylor and the severity of his punishment. Your Lordship thought that the sentence of the Court was a fit award, and this judgment had been to some extent challenged by an expression of public opinion on the subject, and it was difficult,

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under the circumstances, to see how else that expression of public opinion could have been conveyed. Calling a public meeting for the purpose would have been a much graver offence as well as more insulting, and was a course which I would have been very sorry to have seen adopted. The way of enabling the people to come forward and give their opinion as expressed by their Rupee was about as mild a form of expressing an opinion as could well be adopted. I have known of many such similar cases, but have never known of one in which any particular proceedings were taken as in this case.

THE CHIEF JUSTICE.—This subscription was not intended for the purpose of paying off Mr. Tayler's fine.

*Mr. Kennedy.*—Cases of paying off a person's fine for charity are never noticed by the Court, and indeed are very seldom done; but in most cases where subscriptions are raised for the purpose of paying off fines, it is in order to mark public disapprobation at the course adopted. It will doubtless be remembered that when the *Nil Durpan* prosecution (1) was successfully carried out, a wealthy native, named Kali Prosunno Singh, actually threw the amount of the fine on the table of the Court. In *Macdermott's case* (2) there was also a fine, and this was also raised by subscription.

Mr. Justice Macpherson said that it must be remembered that the article in the paper of the 16th April was to be read in connection with the other articles, although there was no charge of contempt in respect of that particular article.

*Mr. Kennedy.*—It appears to me that this is a mere expression of opinion if it has been given *bona fide* and with reasonable care, and if there is no reason why the expression of opinion should not be given in this way, and why persons who really have been challenged to come forward and give an expression of their opinion should not do so, then it would seem a monstrous thing that it should be made a matter of contempt on the part of Mr. Fenwick to give them an opportunity to do so. Another paragraph states as follows:—

“Notwithstanding yesterday having been mail day and a day of considerable business in Calcutta, subscriptions towards the fine imposed upon Mr. Tayler have been pouring in. Our notice yesterday must have been carelessly read by many, as individual subscriptions of 100 rupees and upwards have been offered. The limit proposed was ONE RUPEE. Again we have to remark that the demonstration is in no way intended as a vindication or approval of Mr. Tayler's conduct, but as an independent expression of opinion

(1) (1862) 1 Celebrated Trials 36.

(2) (1866) L. R. 1 P. C. 260.

regarding an over-exercise of power on the part of Sir Barnes Peacock, and as a legitimate protest against undue interference with the right of appeal to the Press."

THE CHIEF JUSTICE.—Mr. Tayler's second apology had been put in the day before that second notification.

Mr. Kennedy.—Mr. Tayler, in his second apology, admitted himself to be altogether in the wrong, and the article in the *Englishman* does not vindicate Mr. Tayler's conduct, but merely says :—

"There are many people who do not care for the grievances of Mr. Tayler, but who will not brook an encroachment upon their right of appeal to the Press concerning the public acts of public men."

I confess my belief that, on investigation, if these proceedings are an encroachment on the liberty of the Press, the opinion would be discovered to prevail extensively among the members of the Bar. This prevails also among Captain Fenwick and many others who are not at all defective in intelligence, who were present and read the proceedings without reference to Mr. Tayler, whom many think to have acted in a very shabby way. Many also entertained an opinion against Mr. Justice Mitter. I will here read the letters that were sent with these subscriptions.

THE CHIEF JUSTICE.—Are these all the names, or are they only of those who consented to have their names published?

Mr. Kennedy.—These are all the names, my Lord, except those of some ladies and those who are in the Mofussil, and have therefore been unable to send in their consent as yet.

THE CHIEF JUSTICE.—I see here "Inigo or Jingo and three friends, H. B. and 10 others, residents of——"

Mr. Kennedy.—Those are all ladies my Lord.

Here Mr. Kennedy read the letters which caused much amusement. One letter being anonymous and of a libellous nature was not read.

Mr. Kennedy continued—Although, after your Lordship issuing the rule, Captain Fenwick published a statement to the effect that he would receive no more subscriptions, yet many further subscriptions came in. There were also many other subscribers who have not sent letters, but who are men of high education and strong feelings as to the rights of Englishmen, which they feel in the present case have been infringed and attacked. I don't know how it was that the subscription came to take place. It has been shown that Captain Fenwick was not the originator of it, but merely agreed to act as Treasurer, and the part he has taken was done by no means with the intention of committing a contempt of Court. One of the

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advantages we enjoy from a free Press is that the expression of public opinion which it allows, prevents the breaking out of conspiracies. The greatest means of keeping our country free from outbreaks is that every person is, able to bring his opinion before the public, when it can be confirmed or refuted by those who have the power and ability to show what is right and what is wrong. The preventing the expression of public opinion, such as this, by the dread of being punished for contempt of Court appears to me to be about as wise as placing a weight on a safety valve to keep a boiler from explosion. Captain Fenwick has probably high ideas of the Press and the duties of an Editor, they may be erroneous ideas, and he may perhaps have gone beyond what he ought to have done in the matter of criticism. The first of the incriminated articles seems to me to be the one of the 26th April and with regard to the first passage which states :—"the extraordinary severity of the sentence was much commented on in and out of Court." That, I take it, my Lord is a mere matter of fact. I believe Captain Fenwick in his affidavit states it as such, and I will be able to procure other *viva voce* evidence of persons who were present to verify that statement, that there was much comment on the sentence, and that the public expected that, after what had occurred on Tuesday morning, they understood that Mr. Tayler, would be, to use a Police Court phrase, warned and discharged, upon his making an apology. The letter went on :—"There was not a listener in Court on Tuesday last to Mr. Tayler's offer of apology, who did not consider from what fell from the Chief Justice, that His Lordship was prepared to accept his apology provided it obtained the same publicity as had been afforded to the letters complained of."

The words "there was not a listener in Court," &c., might be difficult to prove but what I am prepared to prove, is that a large number—nay, an overwhelming majority of the persons in Court did come to the conclusion that your Lordship did not intend to proceed to punish Mr. Tayler in case he published an apology, and included in it a retraction suggested by your Lordship. The article goes on to say that the Ranee of Ticaree's "unprotected position was feelingly dwelt upon, and Mr. Dwarkanath Mitter was extolled in such a manner that he must have blushed, although like Gray's flower, it was "unseen."

That may perhaps be a somewhat irreverent joke at the Hon'ble Mr. Justice Mitter, but I cannot think it amounts to anything like a contempt, or calls for any necessity for measures such as have been adopted.

THE CHIEF JUSTICE.—No proceedings would have been taken for anything like that.

Mr. Kennedy.—Then the letter goes on—

THE CHIEF JUSTICE.—There is a quotation at the commencement of the article which you have not read, Mr. Kennedy.

Mr. Kennedy read the following :—

CALENDARO.—“Will he be punished ?”

BERTUCCIO.—“Yes.”

CALENDARO.—“With what ? a mulct or an arrest ?”

BERTUCCIO.—“With *both* !”

CALENDARO.—“Now you rave, or must intend revenge.”

*Slightly altered from MARINO FALIERO.*

I do not see how that can be considered as applying to the Court. I suppose your Lordship remembers the original quotation, and you will see that the alteration is a very slight one. The joke may not be a very good one, but it is hard to see how it could be applied to the Court. The word in the original quotation is “death.” I take it that quotation is only meant as a sort of expression of opinion, that the imposition of both fine and imprisonment for such an offence was a singularly severe one. Now surely that is a matter in which a journalist is capable of forming a *bona fide* opinion, having seen Mr. Tayler in Court and heard the proceedings. What he says of your Lordships, if it is not in good faith, then it is not justifiable. Your Lordships’s judgment was one of singular power and of deep research, most clearly bringing before the public that which to other Judges would not have occurred. Your Lordship in exercising your real powers did bring an enormous amount of evidence to bear against Mr. Tayler, against whose acts you had formed a very strong opinion. So, surely, there is no dispraise in saying that you had turned every point against Mr. Tayler. The word bitterness cannot be construed into contempt of Court. It merely applies to your Lordship’s manner. It may not be fair to criticise your Lordship’s manner, nor perhaps in good taste, but really your Lordship’s manner is sometimes very forcible, very forcible indeed. You did say that Mr. Tayler’s apology did aggravate his offence, for the apology in the affidavit was but an echo of the other. Yet when it was read in Court you did not intimate that it was improper or objectionable. Your Lordship intimated that it was insufficient, because it contained no retraction. The general opinion then was, that your Lordship had no further intention to punish, but that as the affidavit contained no retraction it was insuffi-

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cient. Yet, surely, pity for Mr. Tayler would not overrule the anxiety in the minds of the public for the honor of the Court.

The case was then adjourned till the following day.

*Mr. Kennedy* resumed his argument. He said :—"I shall again draw your Lordship's attention to the exceptions contained in the Penal Code. Your Lordship seemed to think that the expression of opinion was equivalent to criticism. I confess I hardly think that the true construction. The expression of opinion is a much wider phrase than criticism. The framers of the law evidently held that fair criticism was certainly not libel when they used such a wide term as expression of opinion. They must have meant something very different from the existing state of the law, or they would not have gone to the trouble of defining what good faith was. I think here that there is an invitation in the statute for the expression of opinion in good faith, which is totally exempt from punishment, otherwise the legislature is merely laying a trap. I cannot think this to be the case. In a recent calamity, public opinion ran very strongly against the highest officials ; in fact, it was said that they were indifferent about the death of thousands of people at the time of the Orissa famine, which was attributed to their negligence and want of knowledge. The same opinions prevailed at home, although I understand that human means would have been totally unavailing to prevent the calamity, but yet a strong opinion was expressed that this was caused by the culpable neglect of the officials. There was even a suggestion that this province should have a separate Governor from home, as the existing Lieutenant-Governor was the cause of the evil. I think that was singularly unjust. Yet there was no explanation, no giving of reasons ; still it was not punishable because it was in good faith. The case put yesterday of a Judge and Jury finding a man guilty of murder, and thereupon being accused of having condemned an innocent man, would be an expression of opinion. Might not that be perhaps in good faith, although the reasons did not appear ? Perhaps they might be very weak. But yet that would not imply a doubt as to the speaker's good faith. The 52nd section does not imply that every one must be completely, master of his subject, or that his reasons must be sufficient and good, and that else he is liable to punishment, although such expression was made in good faith. Again, the publication of defamatory words is extended towards words "either spoken, or intended to be spoken, or said." It is not all an unfrequent occurrence to hear defeated counsel expressing strong opinions against the judgment which has overthrown them. Yet, surely, that cannot be defamation though

perhaps erroneous and not fulfilling such demands as "care and attention." Surely the 52nd section does not, say that good faith must be applied in forming opinions, but only in expressing such opinions. Of course, if a man has no opinion, if he knows nothing whatever of the case, what he expresses cannot be in good faith. On the other hand, if he has an opinion, this section gives him the liberty of expressing it. The intention of the Penal Code, is to extend this liberty of expression, yet, if no opinion may be expressed save after careful study, it only misleads the public and contracts their liberty. I now think it right to read Captain Fenwick's affidavit (Here *Mr. Kennedy* put in and read the affidavit) which stated that the articles complained of were inserted *bona fide*, and as a fair expression of public opinion. (Then an article from the *Friend of India*, April, 29). Here the writers appear to have been in Court and seen the reports, and he says that the opinion was shared by all in Court, that nothing further than the apology, which Mr. Tayler afterwards published in the newspaper, would be required of him.

And now this brings me to a very painful portion of my subject I must say that your Lordship's language on that occasion, would naturally lead to the supposition that if Mr. Tayler made the apology required by your Lordship, your Lordship would be satisfied, and that no further proceedings would be taken against him. Mr. Tayler did make an affidavit, which he read to your Lordship, and he also read the case of *Exb. Fletcher* (1), a very gross contempt, when the Court intimated that they would be satisfied with an apology. This was read to your Lordship, and yet you expressed no dissent from such an opinion. Of course that was a matter for your Lordship's discretion, but still I submit that many would think, that as you expressed no dissent, you consented to the contents of that affidavit. I presumed myself that the apology you referred to was that incorporated in the affidavit. The affidavit was then before your Lordship. Any one might think that you meant the apology contained in this affidavit. You further said:—"I leave this remark to Mr. Tayler's consideration."

THE CHIEF JUSTICE.—I did mean the affidavit.

*Mr. Kennedy*.—Under those circumstances, my Lord, it does seem that it was not unnatural to presume that upon a retraction published, as the letters were published, it would be accepted as sufficient. For, although your Lordship did not pledge yourself (having *Van Sandau's case* (2) in your mind) that if Mr. Tayler pub-

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(1) (1841) 2 Mont. Deac. & DeG. 129. (2) (1846) 1 Ph. 605; 1 DeG. 55.



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lished his apology and retractation it would be sufficient, yet that supposition was that nothing further would be wanted. Of course you did not say so; and people may be to blame for thinking so: still that was their opinion. This is what Captain Fenwick says in his affidavit, and if that is not sufficient, I can give the evidence of several most respectable gentlemen whose opinions were identically the same, and who will testify that that was the state of public opinion. I mean that if Mr. Tayler published the apology as he had published the offence, he would be visited with no other punishment. I don't myself like to give evidence, but really there was a great discussion here amongst the members of the Bar, and here that was the general opinion as it was also in the outside world. The reflections on your Lordship in "Bystender's" letter are very strong, but, then, what you have to consider is, whether that was the prevalent opinion caused by what you said or by what you did not say. Of course, if it had been brought to your Lordship's notice you would have spoken more fully upon the matter. But with that we have now nothing to do. What did occur did very naturally give rise to general belief that the publication of the apology was all your Lordship required. I submit, my Lord, that the thing for you to consider is, whether such opinion might not be held *bona fide*. The question is whether the course taken in Court may not have induced people in Court, who had not the same means we had of forming an opinion of your Lordship's judgment, to have taken such a view perfectly *bona fide*. I can't help impressing upon your Lordship the opinion, which could most naturally occur to the minds of such persons, was that a gentleman of your Lordship's ability would not allow such an impression to arise without intending that it should arise. I know that your Lordship did not intend such an impression to arise, but the question is whether it did not arise *bona fide*, and that this letter was the *bona fide* and legitimate expression of the opinion of the person who wrote it. If so, I submit the subsequent remarks were not beyond the limits of free expression, even though the opinion was founded on error. The latter part of the letter is written in a sort of flourishing style, and is to me quite unintelligible, and I am unable to put any construction upon it. In that part of the letter he says,—“there is a marked difference between the dulcet though powerful tones of the British lion and the *arrier pensee* gamut of the Bengal tiger.” What the meaning of these words is, or what construction is to be put upon them, I certainly cannot understand. The other inculpated letter is, I take it one published in the *Englishman* of the 28th April, in which a short extract is given from

Sutherland's Weekly Reporter (1), showing that Mr. Justice Dwarkanath Mitter appeared as Counsel for the Ranee in a case against Mr. Tayler, and the last part of the letter stated what was erroneous as well as ungrammatical. The sentence is as follows :—"By this you will perceive that Mr. Justice Dwarkanath Mitter, who held a brief for the Ranee in this case, afterwards sat as a Judge in a cause between the same parties." This is erroneous, because Mr. Justice Mitter did not sit as a Judge in a cause between the same parties. But of what consequence is it? Is it unprofessional or contrary to precedent that a gentleman of the Bar holding a brief should afterwards sit as Judge in a different suit between the same parties? It is only a rule of etiquette and nothing more, that where an Advocate taking part in a suit, which afterwards comes before the Court, when he is on the Bench, he takes no part in the case. Certainly, the suggestion that he sat as Judge in a different suit between the same parties was no imputation on Mr. Justice Dwarkanath Mitter.

MACPHERSON, J.—The whole point of the letter is that Mr. Justice Mitter having been counsel for one of the parties, had been guilty of unfair and improper conduct in taking part in the case. That was the *innuendo* contained in the letter—or why was it published?

*Mr. Kennedy.*—Well, I don't see why it was published.

MACPHERSON, J.—There is a misstatement in the letter, which any one may see.

*Mr. Kennedy.*—Yes, and it carries its contradiction on the face of it.

MACPHERSON, J.—But the letter is none the less an offence for all that, when the manifest object with which it was written is considered.

*Mr. Kennedy.*—It is hard to see how the letter can amount to defamation. There had been a great deal of excitement about this matter, and,—

MACPHERSON, J.—The letter itself is of no value one way or the other, except that it goes to show the object with which it was written, in imputing improper conduct to Mr. Justice Dwarkanath Mitter.

*Mr. Kennedy.*—There had been a good deal of excitement about this matter, and this letter came to Captain Fenwick's hands, and he published it with a perfectly innocent intention. It is a very foolish letter, but nothing more. It does not implicate Mr. Justice Dwarkanath Mitter or any other person, and is perfectly immaterial one way or the other. That there was and is a great deal of excitement about these cases can hardly be doubted. These cases have

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excited a great deal of interest, and your Lordships need hardly have looked around the Court yesterday or to-day to see that this is the case. In spite of the heat of the weather the Court has been much crowded during the last two days, and this shows the enormous interest and excitement felt about this case as a sequel to the case of Mr. Tayler. The public of Calcutta, not only Europeans but Natives, had become impressed with the value of the principles of English Jurisprudence, and an idea had been engendered that some of these principles were endangered by the action taken by the Court in Mr. Tayler's case. In times long gone by, a very summary course was adopted towards the public in matters which affected the dignity of the Courts. In times long gone by, the person of the Crown was protected with equally stringent prerogatives. The same with regard to Ministers of State, and remarks upon persons holding high offices of State were prosecuted and dealt with almost as treason. He would remind the Court of a case in the reign of Edward IV, where a man's deer was killed, and he wished that the horns of the deer were in the belly of the man who advised the King to do this. That was held to be high treason. Those days however have gone by, and the rights of free speech and free discussion have been gradually widened down to the present day. The greatest change is that in the free discussions on the doings of public men, public men have now learned to view their safety, and men now see that it is good for the commonwealth and for the good of all that there should be free discussion, and that if it overstepped the proper bounds, it should be punished by constitutional means. As I have shown that the discretionary power of exercising a summary jurisdiction in the case of libels upon the Court published out of Court, and after the termination of a case, has never for the last 100 years been exercised in England, it was a power to be exercised with the most guarded discretion—a discretion which has been so guarded in England, that in the whole history of English Law not one case could be found in which English Judges had used this power. The only cases in which this power is shown to have been used are cases from the Colonies and the Isle of Man. Under those circumstances it is not astonishing that it has caused great public excitement, and it is not astonishing that the Court should have been crowded as it was yesterday and to-day. I have now, my Lords, only to close by repeating what I said before, that I can hardly feel that the administration of justice and the respect felt for this Court could receive a heavier blow than they have received by these proceedings of your

Lordships, when it is remembered that these proceedings may give rise to an impression that your Lordships consider a jury cannot be safely entrusted with the administration of the law.

*Mr. Paul* then rose to address the Court. He said:—May it please your Lordships. The duty of showing cause against the rule, which devolves on me, imposes a task at once painful, delicate, difficult, and embarrassing.

Painful, because I shall have to offer in the course of my address remarks of an unfavourable character upon the judicial acts of the Chief Justice, who, by his vast learning and high integrity, has justly earned a great and, I trust, a lasting reputation both in England and in this country.

Delicate, because in doing my duty to my client I should endeavour to avoid, even in the warmth and zeal of advocacy, saying anything which might be considered offensive or disrespectful towards his Lordship the Chief Justice, by whom for many years, I, in conjunction with the learned members of my profession, have been treated with the greatest urbanity, blandness, and courtesy.

Difficult, because I have to cope with conclusions of a foregone character, and to displace views which have already taken hold of the mind of the Court.

Embarrassing, as in reference to the matters under consideration his Lordship is both the Judge and the Advocate, and in the event of a difference of opinion the sole Judge, and it is quite within the range of possibility that the clear intellect and the keen discrimination of the Judge may be obscured or biassed by the partial or colored views of the Advocate. Embarrassing, moreover, as I have to deal only with the heads of the charges made against my client without knowing fully the reasons and arguments by which those charges are capable of being supported, and as in my address I am driven to anticipate every possible view which may be taken of the case. Further, when I reflect that the report in *Crawford's case* (1) fixes my mind on a time and date when his Lordship, the Chief Justice, as Counsel, argued fully on matters now under discussion, and when the humble individual who now addresses the Court had not the faintest glimmering or knowledge of the subject, I feel myself overwhelmed with embarrassment.

Nevertheless, so used are we members of this bar to the indulgence, forbearance, and candour of our Judges, that I am emboldened to state fearlessly my views of the case, in the hope they will throw

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some light on the subject, and exonerate my client from further action of the Court.

If, on consideration, it be deemed necessary to impute faults and errors to Captain Fenwick, I feel he will be acquitted of all malevolence or improper intention. To show that his heart is in the right place, I refer to his remarks on the ability and public character of the Chief Justice, which will be found in one of the articles upon which this proceeding is founded. I take this public opportunity of adding my testimony to that of my client in regard to the great good his Lordship has done to this country. It is enough to mention, amongst others, the introduction of the Penal Code. When I consider the cobwebs of confusion by which the law of Mofussil and Sudder Courts were interwoven, particularly in matters of "Estoppel, *Res Adjudicata*, and judgments in *rem*," and I reflect that all these subjects have been lucidly expounded by the Chief Justice with much learning, care, and patience, I feel that fixity, permanence, and clearness have been given to rules of law, and much and great injustice has been averted and prevented. I feel that we have much to be proud of in the distinguished person of our Chief Justice as the principal administrator of our Courts. I should deeply regret that any pain should be intentionally caused to a Judge who has always been conscientious and able in the discharge of his duties.

The due administration of justice is as much one of the *indicia* of Liberty as the Freedom of the Press, or the freedom of Speech, and I would with equal zeal defend both, *but* within their proper and necessary limits. Authority and Popular Liberty constantly encroach on each other. The pages of ancient history as well as of comparative modern history attest the existence of the constant and fierce struggles between Authority and Liberty. In former times Authority was omnipotent and held precedence entrenching on and circumscribing Liberty within very narrow limits. In modern days that precedence has in a great measure given way, and hence the problem now to be solved is at once delicate and difficult, of accurately defining the dividing line, that while due authority is preserved, full liberty may be enjoyed and the two may act in concert and harmony.

I will now address myself to the legal question, *i.e.*, whether a Court of Justice has the power of summarily punishing for contempts persons in regard to defamatory reflections either on the administration of justice or on the character of a Judge in matters which occur out of Court and after the final determination of the case out of which such matters arise. I submit as a legal proposition that no

disrespect to a Court of Justice which cannot affect its decisions, or actively obstruct or impede the administration of justice, can he legally construed and punished as a contempt of Court. I shall endeavour to maintain this proposition both on authority and principle. Judges have held singular opinions on the subject. The bent of their inclination has been the assertion of authority and curious notions have prevailed in their minds regarding the stability of the constitution, as to its disturbance and convulsion from every matter in the least degree calculated to check authority, or introduce reform, or set aside a foolish and legal prejudice. As an instance, I refer to the arguments of the existence of the "*Scintilla Juris*" graphically described by Serjeant Hayes in his work on Conveyancing. When Chief Justice Popham declared that "to deny the existence of the *Scintilla Juris* was to plunge the State in a Sea of confusion," the learned author adds, that the State was in no peril; but common sense was in imminent danger of perishing amidst the conflicting elements of fire and water. I shall show that Lord Erskine declined to exercise this summary power in *Purcell's case* (1), which was a very flagrant case of libel, though it was much pressed on him in argument by Sir Samuel Romilly.

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Sir Samuel Romilly afterwards retracted his views on the nature of contempts, and thought that in such a case as *Purcell's* (1), trial should be held before a Jury. His retractation is a matter worthy of consideration, having regard to the eminence of his position, his legal learning, and his character as a great and wise reformer. I shall press into the service of my client the arguments delivered in *Rex v. Faulkner* (2) in support of the legal proposition I have laid down regarding contempts of Courts. Mr. Paul then read the above arguments. He contended that the reasoning contained in those arguments went conclusively to shew, *first*, upon principle, the power to commit with reference to libels on Courts published after the determination of a cause does not, and ought not, to exist. *Secondly*—No decided case had laid down that such power existed. *Thirdly*—It would be unwise and expedient to invoke such a power. In a matter such as this the law protected a Judge as well as a private individual, and there was no reason why the ordinary mode of trial by a jury should not be resorted to.

In the above case it is broadly stated that the opinion of Chief Justice Wilmot had not become law, Chief Justice Wilmot's opinion is no doubt often referred to, but I submit that it is not sound, and

(1) (1806) Romilly Memoirs 106.

(2) (1835) 2 Mont. & Ayr. 311.

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if sound at the time it was framed, ought not to be followed, because it will be found on examination not to accommodate itself to the present times. According to Lord Campbell's estimate of his mental capacity, which is not flattering, should the weight of his authority be taken into consideration, and his opinions must be regarded as merely speculative. Mr. Paul next referred to, and commented on the cases before Lord Hardwicke in *St. James Evening Post* (1), *Ex parte Jones* (2), *Long Wellesley's case* (3) and other cases. Lord Hardwicke in the case (1) in 2 Atkyns cited a case of Captain Perry, in which the gallant Captain was punished for contempt for printing his Brief before the hearing of his case. It was submitted, that in the present day such a case would surely not be followed. No case had been decided in England in which the power of summarily punishing had followed out the doctrines laid down by Chief Justice Wilmut. *Crawford's case* (4), which was an apparent authority, would upon examination turn out not to be an authority on the subject. In that case it was considered there was no question to go to a Jury, for the publisher had admitted publication, and the Judge had to construe the publication as to whether it was defamatory or not. The case was not under Fox's Bill, according to which the Jury is to give their verdict of libel or no libel.

Here was a proceeding in which the whole argument turned on a question of law. In such a case trial by Jury was useless, as the fact of the publication and authorship was admitted, the construction to be put on the libel was for the Court to decide. In the judgment of Mr. Justice Erle, it was stated that a case might be conceived, which would have the effect of paralysing the proceedings of the Court. I can conceive such a case; which must point to something more than mere defamatory matter. If a threat were used that your Lordships would be resisted in going to Court, that would be a proceeding which would be likely to have the effect of paralysing the action of the Court, as it would be actively impeding the administration of justice. If the world did believe your Lordship's judgment to be severe, and Captain Fenwick said so, it would have no effect in paralysing the action of the Court, and the equanimity of your Lordships would not be disturbed in the least. In no case in England had the Judges gone the length contended for. It was said that the Court could properly punish as contempt anything which would interfere with the working of the Court, and I can imagine many cases in which the Court might well exercise

(1) (1742) 2 Atk. 469.

(2) (1806) 13 Vesey. 237.

(3) (1831) 2 Russ &amp; M. 639.

(4) (1849) 13 Q. B. 613.

this power. In the case of the *King v. Faulkner* (1) it was held that a Commissioner of Bankruptcy had not the power to punish for contempt. I contend that the letter reflecting upon the sentence of his Lordship as severe was not an obstruction in any way. In the case of the *King v. Almon* (2), Lord Campbell's *Lives of the Chief Justices*, volume 2, page 297, the judgment of the Chief Justice Wilmut begs the question, which it proceeds to prove. It says the Court has the power because it has the power, but shows no instance of its exercise.

It is for the Court to say if they are satisfied with this judgment. The Judge does not know where the power comes from. Thought is here lost in the profusion of language. (Here Mr. Paul read the note of Lord Campbell, to the effect that it was inexpedient for a Judge to exercise this power, and that the proper way to proceed was by criminal information.)

The matters here complained of are not scandalising to the Court. To think so, would be to give the words too wide an interpretation. That is a question for a Jury. *Van Sandau's case* (3) does not come within that class. Where the Court sees a direct attempt to obstruct the proceedings then they are justified in summarily punishing; but in Captain Fenwick's case, the supposed obstruction is from some reasoning, or some argument; and when the Chief Justice says the Courts had better be shut up—it is the inference of intention.

Times have changed and the severity of the Law is now much mitigated, whole pages of the legal literature of England teemed with cases of great injustice done by Judges under color of law. I need go no further than instance the judgment of Sir John Finch in *Hampden's case* (4) which was embellished with what were then considered gems of legal learning, to show that in that case the right course of proceeding had been adopted, and the decision arrived at was based on the divine rights of Kings. I understand your Lordship to say that, if the misrepresentations had been confined to misstatements without any thing being based on them, no notice would have been taken of them. I understand that your Lordship considers the letter of "Bystander" to be a contempt as reflecting upon Your Lordship's character, and also that the advertisement calling for subscriptions was also a contempt of Court, as being intended as a demonstration against the Court. I have already submitted, on the authority of a number of cases, that in cases of libel of this sort on a Judge, after

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(1) (1835) 2 Mont &amp; Ayr. 311.

(2) (1765) Wilmut 254.

(3) (1846) 1 Ph. 605; 1 DeG. 55.

(4) (1640) How &amp; St. Tr. 825.



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proceedings had ended, the Court has no greater powers than an ordinary individual. There was a course other than the present proceedings by which the honour of the Court might be protected. A Judge ought never when practicable to put himself in the position of Prosecutor and Judge in the same case. With regard to the animadversions in the letter of "Bystander," no doubt the word "ruse" is one calculated to annoy Your Lordship; but I hope to be able to show to the Court, although the word was not one which I can approve of,—that it was really intended to express an impression which had gone abroad that Your Lordship had given Mr. Tayler to understand that his apology would be accepted, and had punished him severely without even mentioning the apology which was suggested by the Court.

With regard to what was said to be the grossest libel—the opening of the subscription as a demonstration against the Court—Mr. Paul mentioned that, in olden times, Judges had very curious ideas upon the liberty of the subject and the firmness of the British constitution. If anything was done, it was given out that the constitution was in danger. Even in later times a great want of enlightenment was displayed by Judges of high standing. In Lord Ellenborough's speech on Sir Samuel Romilly's Bill, reported in the 223rd page of the 3rd Volume of Campbell's *Lives of the Chief Justices*, he strongly recommended that the punishment for death for felony to the amount of five shillings should not be abolished; and so late as 1830, Lord Tenterden strongly opposed the abolishment of capital punishment for the offence of Forgery. Mr. Paul then proceeded to read Sir A. Cockburn's remarks in the case of *Wason v. Walters* (1) already cited by Mr. Kennedy.

In modern days Judges do not merely depend on the acts of their predecessors, they do not deliver judgments in such and such a manner, simply because others have done so in cases of a similar character (here Mr. Paul cited several cases which had been overruled). The law as it is written is adamant and inflexible but the unwritten law is so elastic that it adapts itself to the present time, and judgment should therefore be guided by proper discretion. If a dissent of opinion be contempt, then it is impossible to know what is not contempt, and one is at a loss to discover where the bounds of contempt exist. The Earl of Macclesfield was fined £3,000 by the House of Lords, and because the King was informed that his acts were done solely for the benefit of the King he ordered the fine to be paid from the

(1) (1864) L. R. 4 Q. B. 93.

Privy Purse. Suppose a case of a man who had been fined, and that fine were to be paid off by any one in Court, is this a case of contempt? There is the case of the Corporation of Yarmouth, in Durnford and East, on which the present case is judged. But surely that is carrying the law too far. When a man expresses his opinion that a verdict is wrong, or declares it to be so, it does not follow that he says it is infamously so or that he even thinks so. In the present case there has been no obstruction of justice, and he was at a loss to conceive how it could be construed into a contempt of Court except by a process of harsh reasoning. There are wrong verdicts every day. In times past perhaps Juries were more subservient to the Judges, and perhaps that was the reason there are so few cases on record of reversal of sentences, but that does not say that they were not unjust. Provided that they are deserved, animadversions on wrong judgments or on any public acts of any public men were of benefit to themselves and useful to the general community. If there were no liberty of the Press, a Judge could say whatever he pleased.

If their Lordships considered that Captain Fenwick ought to be punished, they would surely acquit him of any endeavour to sap the administration of justice. But it was submitted that the present case was one for a Jury who were uninterested.

(Court adjourned) Upon the reassembling of the Court after a short adjournment for tiffin, Mr. Paul resumed his argument. He said that in the judgment of Mr. Justice Buller, that learned Judge seemed disposed to consider that all animadversions on the proceedings of Courts should be prevented. He (Mr. Paul) submitted that an opinion pronounced adverse to the judgment of a Judge and Jury is perfectly justifiable if not of a calumnious nature.

MACPHERSON J.—Surely that is not disputed.

Mr. Paul said that was the decision of Mr. Justice Buller in the case he had referred to. He (Mr. Paul) would only say that he was one of those who, when occasion required, expressed himself strongly in cases where he felt strongly. There had been cases of Judges of the High Court expressing themselves in strong language. Mr. Paul submitted that if an article was written and published *bona fide*, the reasons ought not to be tested by the severest logic, for if so the government of the world would rest in the hands of two or three persons. The Chief Justice's decisions could be hardly ever assailed, if the reasons for anything which was alleged against them were to be put to the severe test of logic. Mr. Paul then quoted the case of

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*Hurro Chunder Roy Chowdry v. Soorodhonee Debia* (1), where the present Chief Justice had made use of strong language in expressing his opinion, and had said that to come to a different conclusion which was come to by the majority of the Judges in that case, would bring discredit upon the Law and upon the administration of Justice. Mr. Paul continued, and contended that in cases of this kind it was necessary that not only the words but their intent should be calumnious before it could be made an offence. Mr. Paul maintained that these articles did not come within the meaning of the word "contempt," as the judgment of the Court in the case referred to was gone and final. He would now proceed to refer to the law of the liberty of the Press. It was a noble example that Lord Brougham showed when in trying a question relating to the privilege of members of the House of Commons, he did not hesitate to cast on one side certain decided cases, which appeared to the mind of his Lordship to be based on unsatisfactory grounds. He (Mr. Paul) asked their Lordships to do the same. Mr. Paul also read some passages from Mill on Liberty, defining the right of criticism on public men.

He then summed up this portion of his argument by submitting that he was right in stating that with the exception of two Colonial cases, one of which was *Crawford's case* (2), in which the details led him to believe that, although the Court was not sitting, yet the proceedings were still pending, for in that case Mr. Justice Erle said that it was quite possible to conceive cases of contempt calculated to paralyse justice, and therefore, the Court would vindicate its administration, and that it was for the Court in each case to decide whether it amounted to that. If the suit had been terminated these observations would not have been applicable.

Sir Samuel Romilly, a great man and one who had done very much for the good of the country, and who was a great authority, gives an account of certain proceedings before Lord Erskine. They are stated in 6 Lord Campbell's *Lives of the Chancellors* p. 565. He states the facts and arguments in a case in which he had endeavoured to persuade Lord Erskine to exercise this jurisdiction, but Lord Erskine had declined to commit. Sir Samuel Romilly made some very harsh comments on Lord Erskine's conduct but eventually he himself retracted his arguments, and said he believed that a contempt of this kind ought to be prosecuted as a libel. And in *Macdermott's case* (3), the facts were open when leave to appeal was

(1) (1868) 9 W. R. 402.

(2) (1849) 13 Q. B. 613.

(3) (1866) L. R. 1 P. C. 260.

applied for. Lord Westbury gave leave to appeal, and observed on the importance of the question with regard to the various kinds of contempts, and although subsequently that leave was rescinded, it proved nothing because it was merely refused as there was no jurisdiction to entertain an appeal in such a case.

In *Wallace's case* (1) gross charges were made against the Chief Justice by letter sent to him, before the proceedings were terminated, and that of course brought the case within the class of contempts summarily punishable.

The written law was narrowed down to the case in *Wilmot*, and a case which occurred in the Isle of Man, which shows that the power was doubtful, and did not prove satisfactorily that a man could be punished for remarks made after the conclusion of the proceedings. The question seemed to be an open question which, if properly considered, on principles and reasons could admit of one solution, namely, the power to commit does not exist. The next subject was the mode of proceeding to be adopted supposing this to be a case in which the Court still remains of the opinion that they have a right to punish. *Stockdale's case* (2) shows the opinion of the House of Commons that such cases ought to go before an impartial Jury even where the power of the House to commit is extensive and undoubted. Then in 10 Irish Equity Reports (3), no grosser case could be conceived than this, and yet the Court thought that the safety of its honour was not impeached, and that the futile attempts would but recoil on the authors. Letters Patent 1865, section 30, which is already before the Court, and here if the offence does not come under the second exception then it is plainly defamatory and consequently triable under the Penal Code. In *Long Wellesley's case* (4) Lord Brougham considers that the proceedings for contempt are criminal proceedings.

Here in the present case was no specific charge.

THE CHIEF JUSTICE.—The charge is for publishing those letters and notices which are in themselves contempts of Court.

*Mr. Paul*.—Yes, but there is no specific charge.

THE CHIEF JUSTICE.—Then how would it be in the case of an indictment which would only say.—“That on a certain day he did publish and set forth certain articles.”

*Mr. Paul*.—Then, my Lord, there would be an inuendo.

(1) (1866) L. R. 1 P. C. 283.

(2) (1839) 9 Ad. & E. 1; 2 Starkie, 204.

(3) *Birch v. Walsh* (1846) 10 Ir. Eq. Rep. 93.

(4) (1831) 2 Russ & M. 639.

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THE CHIEF JUSTICE.—If you are ignorant as to what I complain of, I will tell you.

*Mr. Paul.*—In the case of indictment there would be a prosecuting Counsel.

THE CHIEF JUSTICE.—But if there were none?

*Mr. Paul.*—Then the defendant should be told.

THE CHIEF JUSTICE.—The substance of the letters and the advertisement was to get up a demonstration to teach the Chief Justice a lesson, and the article stated that the Chief Justice would raise a storm which he would not find it easy to quell. Those were the letters which formed the contempt. Do you wish an adjournment, Mr. Paul, to consider the charges as now explained?

*Mr. Paul.*—No, my Lord, but I submit that my client is prejudiced in not knowing the precise charge brought against him, and which he is expected to meet.

Mr. Paul went on to state that the course adopted by the Court had prejudiced his client, and was a course which ought not to be resorted to, except where it was imperatively necessary. There was a definite punishment provided for defamation in the Penal Code, and a definite way of trial provided for such cases. It was never intended that offences of this description should be dealt with in a summary manner. Mr. Paul then referred to the Jurisdiction of the Sudder Court in cases of contempt; the punishment for which could not exceed a fine of Rs. 200, or a month's imprisonment where the fine was not paid. In America, it was stated in Kent's Commentaries Vol. 1, page 321, that the Courts could only summarily punish in those cases where the contempt was committed in the face of the Court, or was such as to obstruct directly the course of justice. This Court was precluded from punishing except by the Penal Code, and the Penal Code can only punish such offences as come under the sections in that Code. The question was whether what was printed as *bona fide* criticism was a *bona fide* opinion. The well-known case of a Judge in the Colonies, who was told to give his opinions but not his reasons for those opinions, is a matter of history.

On the 13th April a warrant was issued, and Mr. Tayler appeared in answer and admitted the authorship of those letters. In commenting on *Mr. Tayler's case* (1), his audacity and his carelessness were certainly indefensible. The Chief Justice therefore brought a strong artillery of argument to bear against him. On the other hand Mr. Tayler had some reasons for complaining, although not sufficient

(1) (1869) 26 C. L. J. 345.

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to justify him, but still in the course pursued he felt mortified against Mr. Justice Mitter. Yet this did not warrant the careless way and the style in which those letters were written. Mr. Justice Mitter might have retracted what he had said as to Mr. Tayler being directly guilty of fraud, a statement which there was not a tittle of evidence to prove so far as it meant personal fraud. Therefore Mr. Tayler had a grievance which might have been regarded as some extenuation of his conduct, and have mitigated his offence, and on those grounds his sentence might have been less severe; yet not one observation, not one remark, appeared in the long and carefully considered judgment pronounced upon him, to show that there was a single point in his favor. It did not say that he was galled or that he submitted at once—which he did without complaining of his arrest, his submission and his apology might have been sufficient and could have been accepted. In the outside world his wrong was supposed to be true. Yet the Chief Justice went to work with all the zeal and labour for which his judgments are conspicuous, to turn every point against Mr. Tayler. It would be no compliment were one to say that the Chief Justice had been most careful in preparing his judgment. Yet that judgment shows in no way that Mr. Tayler was suffering under irritation which might have given him some cause for his conduct. Mr. Paul then proceeded to refer to the third occasion when Mr. Tayler was brought up, when he presented a petition and made a further apology.

MACPHERSON, J.—The fact of his making an apology did not entitle him to his discharge as a matter of right.

*Mr. Paul* said that it was a matter of expectation that if he did apologise he would not be subjected to any further punishment. In the case (1) in which Mr Piffard and Captain Francis were tried for contempt of Court, the Court was satisfied with an apology expressing sorrow for what had occurred in full of all punishment.

MACPHERSON, J.—All I meant is that a man cannot claim immunity from punishment from the fact of having made an apology for his offences.

THE CHIEF JUSTICE.—Suppose a man were to knock another person down in the street, and on being arrested, make an apology, would he be entitled to consider that sufficient amends?

*Mr. Paul* said that in *Van Sandau's* (2) case, which was a very gross one, a simple apology was held to be sufficient, and quoted Sir George Rowe's remarks in that case, wherein he said he would be unwilling to inflict punishment if he could find a single expression

(1) (1863) 1 Hyde 79; 2 Celebrated Trials. 1. (2) (1846) 1 Ph. 605; 1 DeG. 55.

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of regret. Mr. Paul said that he considered Mr. Tayler's first apology to have been a sufficient one, and that when he expressed his sorrow that implied all retractations, and he did not think it was necessary for him to retract everything, and say in so many words that what he had said was false. That apology appeared to him (Mr. Paul) to have been a sufficient and ample one, and this formed one of the grounds for the writing of the letter of "Bystander," which had been referred to. When it was pointed out to Mr. Tayler that his apology contained no retraction, he made the only retraction he could under the circumstances, as nothing had been said to Mr. Tayler but that his letters were a contempt, and his apology was therefore a general one. He was not told of any particular contempt in any of the letters, and when he begged to be allowed to retract everything which the Court considered to be a contempt he (Mr. Paul) considered that to be quite sufficient. Another fact was that His Lordship in his judgment on Mr. Tayler did not mention one word of his published apology, but after passing his sentence he said something about it. It might very naturally have happened that in a long and elaborate judgment like that, His Lordship might have forgotten to mention it, but outside people had criticised the omission; and it had been mentioned that although the published apology was one which emanated from the suggestion of the Chief Justice, yet that His Lordship had not once mentioned it in his judgment or had taken it into consideration in mitigation of punishment.

THE CHIEF JUSTICE said that after the delivery of his judgment he told Mr. Tayler that if he made certain additions to his apology which had been already published, his punishment would be mitigated.

*Mr. Paul* said that the apology which Mr. Tayler had been required to make was a most abject one, and he was surprised that that gentleman did not consider his reputation to be worth more than a month's imprisonment.

THE CHIEF JUSTICE.—I do not consider the apology was an abject one.

*Mr. Paul* said that it appeared to him the apology was a most abject one as Mr. Tayler stated that what he said was unwarranted and wholly without foundation. He (Mr. Paul) would have suffered six months' imprisonment, no matter how much in the wrong he might have been, rather than make such an apology as that. However much sympathy Mr. Tayler might have had at first, he had since altogether lost it by such conduct. He did not blame His Lordship for demanding the apology, as it seemed to have been fixed in his mind that such an apology was necessary. Mr. Paul mentioned the

fact that Mr. Tayler's final apology was not to be received till a week after the judgment had been pronounced, so that it was seen that His Lordship had fully made up his mind, no matter what apology was given, to sentence Mr. Tayler to a fine of Rs. 500 and a week's imprisonment. He (Mr. Paul) only referred to this in order to show a reason for the misunderstanding which had arisen as regards the law of the case (1) in 652, Russell and Mylne. That was a case in which upon only an apology being made the order was discharged, which shows that an apology is sufficient sometimes, and further, the Chief Justice expressed no opinion that the affidavit, or rather the apology to the affidavit, was an aggravation of the offence, until he delivered his judgment, yet that affidavit was before him, and as to which his Lordship made the suggestion that it contained no retraction.

THE CHIEF JUSTICE.—I was not advising Mr. Tayler.

*Mr. Paul.*—No my Lord; but you gave the impression that if the affidavit was rectified and the apology published, Mr. Tayler would be discharged.

He then continued.—There was nothing in the character of the Chief Justice to induce the Editor to calumniate and attack him. In fact he only said that *in case* he carried his dictum too far he would raise a storm. There is surely no contempt in that. The only dictum was that the Printer and Publisher would be proceeded against; naturally the Editor took offence at this. This did not refer to anything the *Pioneer* had said. The *Pioneer* contained no dictum. It was the *Friend of India* that contained the dictum, which the Editor thought was going too far. Since the Court has signified its disapprobation the Newspaper has been silent on the subject and in no way endeavoured to prejudice the proceedings.

MACPHERSON, J.—The article of the 26th April states or at least imputes that the Chief Justice acted wrongfully and attacked and turned everything *against* Mr. Tayler that he possibly could, and then protests against the cruelty (not the severity) of the sentence. There is a vast difference between cruelty and severity. The poetry must be taken as part of the article.

*Mr. Paul* said that this was merely an expression of what the public opinion was. Surely an Editor is not responsible for an opinion that prevails or for expressing it. The *Friend of India* had done the same thing. He himself thought that Mr. Tayler would have been discharged. In fact from what the Chief Justice had said on Tuesday, he (Mr. Paul) did not attend on Saturday, although he

(1) *Long Wellesley's case* (1831) 2 Russ & M. 630.

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was watching the case for Mr. Tayler—for, in fact, he thought that nothing further would be done. Many people thought that the public apology was not fairly treated and therefore they thought the sentence a cruel one. Exception should not be taken at that one word "cruel" here which merely meant harsh, and nothing more. The Editor had never had a wish to impute malice to the Chief Justice, or he would not have paid the tribute he did to the Chief Justice's talents, &c., which he did in the lines directly preceding the word cruel. Surely the Chief Justice was a little too sensitive. There was not one misstatement, not one unfair criticism even, and could that article be called *mala fide*? It was difficult to convince a Judge who himself had to put what construction he pleased on the sentences he finds offensive and to judge of their meaning himself. Did the Chief Justice think that a Judge who thought he had done right should not be told he had delivered a cruel judgment (meaning a harsh judgment) if that judgment had been unnecessarily severe. After all the Chief Justice did go unnecessarily into the past life of Mr. Tayler, and on matters not put in evidence, and the hearers upon that thought the judgment cruel.

THE CHIEF JUSTICE.—The object of that judgment was to justify the Court and not to attack Mr. Tayler.

Mr. Paul here mentioned the very strong remarks which had been made on Mr. Justice Shee and the Jury who had tried Toomer when almost every newspaper in England denounced both the verdict and the sentence. He continued: Mr. Tayler had a grievance, and in consequence of that he did very unwisely insult Mr. Justice Mitter. The Chief Justice's high and exalted position precludes his personally witnessing or being conscious of the agencies of disappointed suitors. Mr. Tayler knew that he was not in the country when the fraud was committed, so that at the most he could only be accounted guilty of a constructive fraud, not of any moral fraud. Had Mr. Justice Mitter said that the fraud was perpetrated by Mr. Tayler's agent all would have been well, but he did not do so.

Mr. Paul then proceeded to comment upon the judgment, showing that Mr. Tayler really had been aggrieved. The Chief Justice in his judgment in the case of Zuhooroonissa against Mr. Tayler said that it was unnecessary to consider the question whether there had been any fraud or concealment. To this judgment the Hon'ble Mr. Justice Mitter said "I entirely concur," and when the Chief Justice said that it was unnecessary to enter into the question, Mr. Justice Mitter held that it was not necessary to decide, for that was part of the Chief Justice's judgment, and notwithstanding this

concurrence he went on, and found that Mr. Tayler had been guilty of both fraud and concealment. There was no evidence before the Court in that case to justify Mr. Justice Mitter in saying that Mr. Tayler had committed fraud. All that could by any means have been said upon the evidence was that a fraud had been constructively committed on behalf of Mr. Tayler, but not by him, because all the transactions with Ahmedoolah were conducted by Enayut Hossein, who was acting as agent for both parties.

The Court then adjourned to the following day.

*Mr. Paul* in resuming his argument said that when the Court rose yesterday he was still on the subject of the article of the 26th April, with reference to that part of it which stated that every possible point had been turned against the accused. He (Mr. Paul) had also endeavoured to show that Mr. Tayler had good grounds for complaint against the decision of Mr. Justice Dwarkanath Mitter, and concluded by showing that although the Chief Justice had declared it to be unnecessary to decide whether there had been any fraud or concealment on the part of Mr. Tayler, that Mr. Justice Dwarkanath Mitter after declaring his concurrence in the judgment of the Chief Justice, went further, and expressed what he (Mr. Paul) could not help thinking was a dissent from the judgment of the Chief Justice, that it was unnecessary to decide that fraud had been committed. Mr. Justice Mitter's judgment was as follows—"I entirely concur. I feel no hesitation in holding that the plaintiff is entitled to recover both upon the ground that she has paid a debt due from Mr. Tayler to Raneè Usmedh Kower when she was under no obligation to pay it, as also upon the ground that a fraud has been perpetrated against her by Mr. Tayler in concealing from her the fact that the estate sold by him to her was under attachment in execution of a decree of Court. I should have been extremely sorry if the state of the law were otherwise." As to the duty of the Judges, he (Mr. Paul) must defer to the Bench as it must know better what its duties were than any of the outside world, but it struck him that it behoved Judges to be particularly careful in the expressions used in their judgments, that the ordinary meaning was to be given to the words used. If a Junior Judge thought that the judgment of his Senior required to be made stronger by further remarks, it was his duty to make them and to give his reason for doing so. But in this case no reason was given as to why, when the Chief Justice had declared it was unnecessary to go into the question of whether there had been fraud or not, the Junior Judge should have considered it to be his imperative duty to come to a finding directly

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opposed, without assigning any reason. He (Mr. Paul) would assume, as indeed the judgment showed, that the bargain for the sale of the estate was altogether carried on between Enayut Hossein and Ahmedoolah, and that Enayut Hossein acted in the matter as the agent of both parties. Enayut Hossein stated that Ahmedoolah knew of the attachment, and that he had told him of it. Mr. Tayler was at a distance at the time and took no part in the proceedings, and how therefore was he to know that Enayut Hossein who was acting as agent for both parties, had kept concealed a fact which was in his knowledge, from his other principal. Justice Dwarkanath Mitter did not say in his judgment that the agent of Mr. Tayler had committed fraud, and that Mr. Tayler was constructively responsible for the acts of his agent, but he said that Mr. Tayler had committed a fraud himself, and he (Mr. Paul) contended that that conclusion was arrived at without there being a tittle of evidence to support it. Mr. Tayler never took any part in the contract with Ahmedoolah from beginning to end, but left it all to his agent, and an amount of moral obloquy had been thrown upon him which there was not a tittle of evidence to support. The Chief Justice in his judgment had expressed his disbelief in the evidence of Enayut Hossein and his belief in that of Ahmedoolah, not from the fact that the evidence of one was preferable to the other by reason of character, but from a chain of circumstances. His Lordship had shown in his judgment that if Enayut Hossein was to be believed, there would have been something done which had not been done. He would ask His Lordship to bear in mind these facts. The judgment on the original case was tantamount—perhaps not to a direct charge of perjury against Enayut Hossein, but sufficiently so for Mr. Tayler to hold and express the opinion that the Court had considered he had been guilty of perjury. He would now refer to Mr. Tayler's petition, for a review of judgment. In that petition Mr. Tayler said as follows:—“All your petitioner now desires to do is to inform the Court that the statement put in and the evidence given by Enayut Hossein and his creatures are totally false.” This was a statement of fact and was nothing more than what the Court had already decided in its judgment. Mr. Tayler's petition went on—“and was made and given without the approval, concurrence, or knowledge of your petitioner, and in direct opposition to the instructions given by your petitioner to Enayut Hossein before his departure from India.” Mr. Tayler said that the fabric of the defence set up by Enayut Hossein was directly contrary to the instructions he gave him before leaving for India. Mr. Tayler never disputed nor wished to dispute his liability

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for a portion of the money, and when the action was brought against him, the defence set up by his agent was directly contrary to his written instructions. Mr. Tayler, as far as he was aggrieved, was satisfied by the statement that the Chief Justice had not made any imputation of moral fraud against him, and he accordingly bowed to the judgment. The Court allowed the proceedings for review of judgment to go on and Mr. Tayler fully believed that some justice would be done him in that way. He had put in a petition which he had verified by affidavit, praying that the words used in the judgment of the Hon'ble Mr. Justice Dwarkanath Mitter might be in some way retracted or modified. This might have been done without detracting from the gravity of the judgment in any way. The course of justice did not require that the words should be repeated, and though the Court was right when it said that it could not go on to a review of judgment in a case where the party applying to the Court did not express himself aggrieved at the decree, but the Court might have done something for the reputation of Mr. Tayler by retracting or modifying the remarks which had been made against him. That might be done by stating that the fraud imputed to Mr. Tayler, was fraud committed by Mr. Tayler's agents in his absence. In the judgment of Messrs. Norman and Loch, in the Ticaree case, words which were used in the judgment were afterwards modified, and the same might very well have been done in this case. Mr. Tayler could not be considered to be an active party to the perpetration of the fraud as he was absent in England at the time, and when the negotiations were going on with Ahmedoolah, Mr. Tayler was only constructively negotiating with him through his agent Enayut Hossein, and not actively. Mr. Paul then submitted that in order to correct what was found to be an error in a judgment it was not necessary that there should be a review of judgment, and the Court, in the case of an error in a judgment which was admitted in itself to be a correct judgment, had power to rectify the error, by retracting or modifying the expression to which exception had been taken. If a date in a judgment was found to be wrong, or the names of parties were declared wrongly, or a genealogical tree was not properly placed in the judgment, it would not be necessary to apply for a review of judgment in order to correct them. His Lordship the Chief Justice in refusing the application for a review of judgment said—"It appears to me that there is no ground for reviewing the judgment. I have read very carefully the judgment which I delivered in this case, and see nothing in it which I can retract. I did remark upon the judgment of the Subordinate Judge, but

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abstained from expressing any opinion as to whether there was any fraudulent concealment on the part of Mr. Tayler." In the course of Mr. Justice Mitter's judgment on the same application, he said—"I wish to add, however, that I should not be justified in withdrawing the remarks in question upon an *ex-parte* proceeding of this kind. Enayut Hossein is not before the Court and so far as the plaintiff is concerned she is in no way interested in opposing this application, inasmuch as the petitioner is not seeking for any interference with the decree which had been passed in her favor." If this were to be the case it would be impossible for a person to obtain redress for injuries of this kind, if the other person were out of the jurisdiction of the Court or transported beyond the seas. Why was Mr. Justice Mitter so careful of the reputation of Enayut Hossein? If these proceedings were *ex-parte* there were no grounds to affect Enayut Hossein's character; why should he reject the petition? Why should the Court express no opinion on evidence before it? Nobody asked Mr. Justice Mitter to hold Enayut Hossein guilty of the serious offence. How could a prosecution have benefited Tayler when the Chief Justice had already stigmatised Enayut Hossein as guilty of a falsehood, and when Enayut Hossein was at that very time undergoing a sentence of imprisonment for frauds perpetrated against Mr. Tayler? Why should he be put to these great expenses? Surely it would have been sufficient for Mr. Justice Mitter to have said that during Mr. Tayler's absence this fraud was committed by his agent. It does not matter whether Mr. Justice Mitter believed Kelly or not; it is sufficient that Kelly took the responsibility on himself; he admitted that Mr. Kelly had had no hand in the fraud; this was evident. Many European gentlemen had to rely on their agents for native contracts. It is very good advice of Mr. Justice Mitter's that Mr. Kelly should have known what was in the statement, but that advice was impracticable. Mr. Tayler was deeply aggrieved. The reasons of Mr. Justice Mitter were not satisfactory; if it was intended to charge Mr. Tayler with personal fraud there was not a tittle of evidence to support the accusation. Had he put his grievance in a short, clear, logical way he might have cleared his character, but he went into the hyperboles censured by the Chief Justice. Mr. Tayler was more sensitive on account of the Chief Justice's observations. The Chief Justice has delivered the judgment from an attacking point of view. He felt that a colleague had been attacked. Here is a proof of the evil of the Prosecutor being the Judge. The Chief Justice considered Mr. Tayler's insolence and the insult offered to Mr. Justice Mitter, but he forgot Mr. Tayler's grievance. Mr

Tayler being a man of some historic reputation, and a man of some accomplishments, though during the time of his practising as vakeel he had been unfortunate in litigation which concerned himself, he felt deeply the attack on his character, there was, therefore, some extenuation for his offence, not perhaps sufficient to stop the Chief Justice's judgment, but sufficient to mitigate the blame and lessen his degradation. Mr. Paul then turned to the subject of the opinion which had been formed as to the severity of His Lordship's sentence, and went on to say that he submitted, with all due respect for Mr. Justice Mitter, and to the Court, that in his view the reasons which had been given for the view which had been expressed of Mr. Tayler's conduct by Mr. Justice Mitter, were not correct, and that gentleman had every right and reason to complain of having been adjudged guilty of fraud without any evidence to support that view, and he also had a right to complain that when he presented his petition for a review of judgment, the Judge refused to retract or modify one single word which he had used. All these circumstances might be urged in extenuation of the conduct of Mr. Tayler. Mr. Tayler had committed a very foolish act doubtless in appealing to the papers, but the Court must look to the provocation he had received. There was no doubt that Mr. Tayler had a grievance, and if he had proceeded to vindicate his character in a proper way, it was not impossible to say that public sympathy might not have gone with him. With regard to the second point of the same subject, the allegation that the Chief Justice had turned every point that could be turned against Mr. Tayler with great severity and bitterness, Mr. Paul proceeded to justify these remarks—With regard to the judgment itself, if the Chief Justice thinks that the two cases of the Ranee of Tekarri and of Zuhooroonesha had such connection as to make it proper to introduce the circumstances of the Ranee's case into his judgment there is some reason for "Curiosity" in his letter deeming them to be connected cases.

As to the observation made by your Lordship on the statement on the 1st letter and the petition of review and Mr. Tayler's oral explanation, I cannot help thinking your Lordship has misapprehended Mr. Tayler's meaning. I believe Mr. Tayler meant to say that if Mr. Justice Mitter had based his judgment on the hypothetical case of fraud he would have had nothing to say, and not that if the Chief Justice had agreed with Mr. Justice Mitter then he would have had no ground of complaint. The plea as to whether there was a fraud is one thing ; that Mr. Tayler was the author of it,

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is quite another. Mr. Tayler did not hesitate to attack the judgments of Judges Norman and Loch. I think the charge of degraded cowardice conveyed by your Lordship was not founded on the facts of the case. Tayler had no ground of complaint against your Lordship, and that was the reason he did not attack you. It was not because your position rendered you unassailable.

MACPHERSON, J.—Why are you arguing on Mr. Tayler's case? Is it with the view of showing that the article in the *Englishman* of the 26th April is correct in fact.

*Mr. Paul.*—Yes, my Lord.

MACPHERSON, J.—That the judgment of the Chief Justice was a vindictive judgment.

*Mr. Paul.*—No, not with that view, but that it was an unnecessarily severe judgment.

MACPHERSON, J.—The imputation in the article is that the sentence was a vindictive one. The wording of the paragraph is not that the sentence was severe, but that it was cruel.

THE CHIEF JUSTICE said that the word "cruel" imputed a wish to cause pain.

*Mr. Paul.*—That I submit is not the meaning which the word is intended to convey.

THE CHIEF JUSTICE.—If the remark was merely that the judgment was a severe one, it would be no contempt. That would only be fair criticism.

*Mr. Paul* said that he was placed in a very peculiar position. There was not the slightest intention to cast an imputation on his Lordship, but the whole case had turned on a misunderstanding which had unfortunately arisen. Where the word "cruel" was used, it only meant to express harshness and severity, and nothing more.

THE CHIEF JUSTICE.—The article says that I knew of Mr. Tayler's bad state of health. That I did not know; all that I did know was that he was suffering from gout, and as I had shortly before that seen him in society, and knew that he was able to make a journey to Patna, I did not know he was suffering from anything else than a simple attack of gout. I knew nothing of what was stated in the medical certificate until after the judgment had been delivered.

*Mr. Paul.*—Your Lordship comes to the conclusion that this article is intended to charge you with cruelty.

THE CHIEF JUSTICE.—If the word only means severe I do not complain.

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*Mr. Paul* continued—He said that the word “cruel” in the articles must be taken in connection with the words which followed it. In one part of the article the sentence is called a cruel one, in the next paragraph the words “the harshness of the sentence” occur, and a little lower down there are the words “cruel severity.” Captain Fenwick never intended that the word “cruel” should be used in the bad sense which had been imputed to the words, and he said so now publicly through him (*Mr. Paul*) He hoped the Court would not construe the word cruel in that bad sense.

MACPHERSON, J.—That is the ordinary meaning of the word.

THE CHIEF JUSTICE—The meaning of the word cruel is a pleasure to inflict pain.

*Mr. Paul*.—How could it be imputed that your Lordship would take pleasure in inflicting punishment?

MACPHERSON, J.—The question is whether that was not imputed.

*Mr. Paul*.—I submit it was not. All that it was meant to express was that the sentence was a severe one—a very severe one.

MACPHERSON, J.—There could be no objection to having it said that the sentence passed was a very severe one.

THE CHIEF JUSTICE.—If it is said that the word was not intended to be used in any bad sense, I am willing to accept that statement.

*Mr. Paul*.—I now state on behalf of Captain Fenwick that the word was not intended to be so construed.

THE CHIEF JUSTICE.—I am ready to hear the rest of your argument and will accept Captain Fenwick’s statement. If the charge had been only that my sentence was a severe one, none of these proceedings would have been taken.

*Mr. Paul*.—Your Lordship’s mind was so filled with indignation that the other matters in mitigation of *Mr. Tayler*’s conduct did not strike you. If it were not the intention of Captain Fenwick to say that you were guilty of deliberate cruelty, you will be satisfied then? I think I can prove that the use of the word all through the articles would be inconsistent with such an intention. He does not call you cruel, which might have the sense imputed, but calls the sentence cruel when the word could only mean at the most extremely harsh and severe.

To go on with *Mr. Tayler*’s case. No charge was made, merely an inference. I don’t think the charge is fair that he attempted to prevent justice in the *Ranee*’s case, because it does not arise out of the evidence in this case, and after Messrs. Norman and Loch had



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acquitted Mr. Tayler; but to add a sting you urge that affidavit was irregularly taken. Surely these observations did not fairly arise, and they were very severe and should not have been adverted to. I hope I do not give offence, but I must express my views.

THE CHIEF JUSTICE.—I do not look upon anything you say as an offence. I give you full liberty, and I hope you will not restrict yourself from the fear of offending.

*Mr Paul* then resumed, and again ran over the arguments as to the Chief Justice's judgment having been very severe. In that judgment Mr Tayler was identified with all the acts of Enayut Hossein: he was actively guilty of fraud and taunted with having tried a new way to pay old debts: though he was absent from the country at the time and denied all knowledge of the matter. He said that no one had ever yet come into Court without one scrap of anything, without one scintilla of extenuation in his favour. Yet none appeared in the judgment, and on those grounds it was very severe. The Chief Justice had no right to go back into Mr. Tayler's previous history, which was not in this case. That was another reason why it was severe. The Chief Justice knew Mr. Tayler was suffering from gout, which at his advanced age was very virulent, and that again made the sentence most severe or cruel in its least offensive sense. That word must be taken with the subsequent context, which shows what the *animus* was, "We do not defend what Mr. Tayler wrote, but we do protest," &c. If the Editor did not defend Mr. Tayler he could not mean that the judgment was cruel in its worst sense.

THE CHIEF JUSTICE.—If he meant that the object of the Judge was to give pain and not to administer justice then I understand the word *cruel*.

*Mr. Paul*—No, my Lord. Captain Fenwick imputed no facts to show there were private feelings.

THE CHIEF JUSTICE.—What does "Now you rave or must intend revenge" mean.

MACPHERSON, J.—This would appear to be vindictive.

*Mr Paul*.—Inasmuch as the article professes to be *bona fide*, the word "cruel" cannot bear that character.

THE CHIEF JUSTICE.—Then why was the quotation altered in one instance to suit Mr. Tayler's case and not in the word "revenge"?

*Mr. Paul*.—You see, my Lords, were this case before a Jury, then we could see how ordinary minds would construe the word. As to me I do not know what it meant? I would ask how many men would have known what it meant. I will however submit that no

facts are mentioned from which malice could be imputed. When flattering eulogiums precede why should such imputations of malice be made, they are wholly inconsistent with such an imputation.

Mr. Paul then read the following paragraph from the Chief Justice's judgment: "I am an unflinching advocate of the liberty of the Press. I believe that its freedom is one of the main bulwarks of the rights of the people. I claim no exemption as regards my public acts from the most rigid scrutiny and the most unsparing criticism. All I claim is, that there shall be no misrepresentation and no wilful or unfair concealment of facts; and that those who deny infallibility to the Judges shall not claim infallibility for themselves. I have had no cause to complain of the public Press since I have been in this country. Speaking generally, I believe it to be fair, independent, and impartial. There has not, I believe, been a single criminal prosecution against a newspaper since I have had the honour to hold the office of Chief Justice, and there have been only one or two private actions for libel. The Press in this country addresses itself for the most part to readers of education and intelligence, men who judge and form opinions for themselves. The Press is fair, it is not scurrilous; the public are not captious; and public men do not object to have their public acts freely discussed and fairly criticised. Our Courts therefore are generally free from complaints against the Press, either Civil or Criminal, on the ground of defamation."

He continued, Captain Fenwick had not sinned in any way against that statement. No false facts had been stated in the article in the newspaper, and the only thing to be regretted was the use of an unfortunate word in it; to which a meaning had been given which it was never intended that word should convey, and which it did not and could not properly convey. It was a very gratifying circumstance that, throughout all these proceedings, His Lordship's general opinion of the Press was favourable, and also, as would be seen from this very article, the general opinion of the Press with regard to His Lordship was also favourable. When the Press, as His Lordship said, "addressed itself for the most part to readers of education and intelligence, men who judge and form opinions for themselves," it could not be said that His Lordship's reputation would suffer one iota from anything it might contain. He would mention that, since Captain Fenwick had assumed charge of the *Englishman*, a manifest change for the better had been observed in the conduct of the paper, and the scurrility with which some people had charged it had altogether disappeared. It was unfortunate that Mr. Tayler's wrongs

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should have been ventilated through the newspaper. Mr. Paul read other portions of the article of the 26th, and contended that there was nothing which could be objected to. He submitted that if Captain Fenwick was punished for contempt, that would not alter the opinion of the public as to the sentence on Mr. Tayler, but would only constitute Captain Fenwick a martyr for the opinion of the public.

THE CHIEF JUSTICE.—My object is not punishment but to vindicate the action taken by the Court. In showing these articles to be a contempt of Court, I do not mean that there is any moral delinquency on the part of Captain Fenwick, as I thought there was in Mr. Tayler's case.

*Mr. Kennedy.*—Under these circumstances, I don't think we should be justified in further taking up the time of the Court.

THE CHIEF JUSTICE.—This is, not an attack upon the liberty of the Press. All I want to show is, that if anonymous letters are sent to the Press containing false statements, the Press is responsible for them, if the name of the author is not given up.

*Mr. Kennedy.*—Your Lordship has said that it is not your intention to punish Captain Fenwick.

THE CHIEF JUSTICE.—No, not after what Mr. Paul has said. All I want is to explain my reasons for the course which has been adopted.

*Mr. Paul.*—With regard to the word "ruse" in the letter of "By-stander"—

THE CHIEF JUSTICE.—I don't think Captain Fenwick was the author of that anonymous letter.

*Mr. Paul.*—No, my Lord, he was not.

THE CHIEF JUSTICE.—He has, however, taken the responsibility upon himself, but the letter is written in a style which I do not think would come from Captain Fenwick.

Captain Fenwick very properly submitted to the Court, when the Court first expressed its opinion that receiving subscriptions was a contempt by declining to receive any more, and he has now very properly explained that the language which was supposed to cast imputations on the motives of the Chief Justice was not so intended. All I mean to contend is that false statements published in newspapers are not fair criticisms. I have no intention of interfering with the right of appeal to the Press, but no one has a right of appeal to the Press by bringing false accusations founded on wilful mis-statements.

*Mr. Kennedy.*—As your Lordship has expressed your intention not to punish, I have no right to take up the time of the Court any longer.

THE CHIEF JUSTICE.—I will hear you on the point as to whether the articles are contempts. If I had waited to proceed by indictments before proceedings were taken, all the mischief, which I wished to prevent, would have been done ; and in *Mr. Tayler's* case, he would have gone to England if instant and summary measures had not been taken, and would have left the printer and publisher of the paper to be alone responsible.

*Mr. Paul* asked whether their Lordships held that in any case it would not be right to open a subscription for the purpose of obtaining a demonstration of public opinion.

MACPHERSON, J.—That depends very much on the way in which it is done. It is just as easy to write pointedly without being defamatory. If however, you wish to hear the decision of the Court you had better resume your argument.

THE CHIEF JUSTICE.—And let everything which has been said be withdrawn.

*Mr. Paul.*—As I understand, any further argument on the matter would be of no use. If the Court is satisfied that no imputations were intended, I do not see the good of any further argument.

*Mr. Kennedy.*—I don't understand the Court to say that in every case a demonstration got up in order to obtain an expression of public opinion would be a contempt.

THE CHIEF JUSTICE.—No.

*Mr. Kennedy.*—Suppose in a case of an encroachment on the liberty of a subject by a Judge, it could not be said that it would be unjustifiable for those who thought their liberties had been encroached upon to come forward and give a public expression of their opinion or to support it by subscription.

THE CHIEF JUSTICE.—No ; but I hold this to be a contempt, as it contained a threat.

*Mr. Paul* said there was nothing to be gained by going on any further. He begged to thank the Court, on behalf of *Mr. Kennedy* and himself for the patient hearing that had been given.

THE CHIEF JUSTICE.—The Court would have been prepared to decide that these articles are a contempt, but under all the circumstances, and as all imputations of motives have been disclaimed, and *Captain Fenwick* having submitted to the Court when the rule was issued, the rule will not be carried any further, but will be discharged.

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MACPHERSON, J.—I also, as far as the case has gone, was prepared to decide that the Court has power to proceed in this matter by way of contempt, and also that there have been two contempts of Court. As regards the power of the Court to proceed by way of contempt, even when the contempt is not committed in Court or during the pendency of a suit, that point was fully settled in the case of *Mr. Piffard and Captain Francis*, (1) which was tried before a bench of 11 Judges. In that case Captain Francis who was a stranger to the Court, was brought up for contempt which consisted in delivering or attempting to deliver at Judge's house a message relating to what had occurred in Court between a Judge and Mr. Piffard. In that case Mr. Bell argued that the Court had no power to deal with the matter which took place out of Court, but out of the 11 Judges sitting 9 held that to proceed by way of contempt was a proper way of dealing with the case. A decision of such a number of Judges quite settles the question as far as a Division Bench of 2 Judges is concerned. Mr. Piffard's case was quite different, as he was an advocate of the Court.

THE CHIEF JUSTICE.—I may say that, in my opinion, Captain Fenwick has adopted a very honourable and proper course in this matter by avowing himself to be responsible for the articles which have appeared, and thus taking the responsibility off the shoulders of the printer and publisher who had nothing to do with it. It would have given me much pain if I had been obliged to proceed against the printer and publisher. I also think that Captain Fenwick has adopted a very proper course in having, through Mr. Paul, withdrawn all imputations of improper motives on the part of the Chief Justice, and in having explained that the word "cruelty" was not intended in any bad sense, but merely as meaning severity. Captain Fenwick not having any such intention, although the word was susceptible of bearing such a meaning, has done himself honour by expressing that he had no such intention. I repeat that the only object I had in taking summary measures against Mr. Tayler was that he was about to leave for England, and if he had been allowed to go away the printer and publisher of the paper would have been left responsible for his letters. I have already stated that I am an unflinching advocate for the liberty of the Press, and I repeat what I said before, that I do not claim for myself any immunity from unsparring criticism for any of my public acts, but all I claim is that there shall be no wilful

(1) (1863) 1 Hyde 79 ; 2 Celebrated Trials 1.

misrepresentation or concealment of facts which the person criticising knows to be altogether unfounded. It appears to me that the public Press as well as the Judges of the Courts are all instruments for the public good, and, in my opinion, the more public men are submitted to public criticism the better for the public, provided that the criticism contains no misrepresentations of facts or undue concealment. With this explanation, I order the rule to be discharged.

A. T. M.

*Rule discharged.*

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## SPECIAL BENCH.

*Before Sir Lancelot Sanderson, Knight, Chief Justice, Sir John Woodroffe, Knight, Judge, Sir Asutosh Mookerjee, Knight, Judge, Sir Charles Chitty, Knight, Judge and Mr. Justice Fletcher.*

IN THE MATTER OF TARIT KANTI BISWAS, PRINTER  
AND PUBLISHER OF THE "AMRITA BAZAR PATRIKA" AND OTHERS \*

CRIMINAL.

1917.

June, 11, 12, 13  
and 27.

*Contempt of Court—Newspaper article—Interpretation—Meaning and intent—Scandalous attacks on Judges—Attack on Judge with reference to cause to be tried—Court of record—High Court—Power to punish summarily—Publication of libel on Court or on the Judges—Proceedings, true nature of—Civil or Criminal in character—Civil and criminal contempts, distinction between.*

It is incumbent on Court, in all cases, to consider the general tone of the writing. The meaning and intent are to be determined by a fair interpretation of the language used and are matters of law for the Court as to whether or not they constitute contempt. Disclaimer on the part of the publisher as to any intentional disrespect to the Court is consequently not a sufficient defence, when the purpose and meaning of the writing is obviously of a contrary import. If the language is fairly capable of an innocent interpretation, the Court will not be astute to read into it a similar import. But if the intent is fairly clear, liability to punishment for contempt of Court cannot be successfully made by the use of a transparent artifice.

*Legal Remembrancer v. Matilal Ghose* (1); *Re Townsend* (2); *Re Martindale* (3) and *Daw v. Eley* (4) referred to.

Contempt by speech or writing may be by scandalising the Court itself or by abusing parties to actions or by prejudicing mankind in favour of or against a party before the cause is heard.

\* In the matter of a Rule upon the Printer and Publisher, Directors etc. of the "Amrita Bazar Patrika".

(1) (1913) 18 C. L. J. 452.

(2) (1906) 22 T. L. R. 341.

(3) (1894) 3 Ch. 200.

(4) (1868) L. R. 7 Eq. 59.

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The High Courts in the Indian Presidencies are Supreme Courts of record. The High Court has power to punish summarily a contempt of Court committed by the publication of a libel on the Court or on the Judges, when the Court is not sitting.

*Surendra v. Chief Justice of Bengal* (1); *Legal Remembrancer v. Matilal Ghose* (2); and *In re Abdul* (3) referred to.

The printer and publisher of a newspaper is liable for contempt even though he was not aware of the subject constituting such contempt.

*Sanderson, C. J.*: The jurisdiction which the Court has in respect of a contempt of Court should be exercised with great care and should only be exercised when the case is beyond all reasonable doubt, and this should especially be the case when the proceedings are at the instance of the Court itself.

*Per Mookerjee, J.*: Scandalous attacks upon Judges calculated to cause an obstruction to public justice, constitute contempts of Court. Punishment is inflicted for attacks of this character upon Judges, not with a view to protect either the Court as a whole or the individual Judges of the Court from a repetition of the attack, but with a view to protect the public, and specially those who, either voluntarily or by compulsion, are subject to the jurisdiction of the Court, from the mischief they will incur, if the authority of the tribunal be undermined or impaired.

A contempt of Court is committed by libellous attacks on a Judge for what he did judicially, if such attacks are likely, or tend in any way, to interfere with the due administration of justice.

It is immaterial whether the attack on the Judge is with reference to a cause about to be tried, or actually under trial, or recently adjudged; in each instance, the tendency is to poison the fountain of justice, to create distrust, and to destroy the confidence of the people in the Courts, which are of prime importance to them in the protection of their rights and liberties.

The publishers of newspapers have the right, but no higher right than others, to bring to public notice the conduct of Courts, and, provided the publications are true and fair in spirit, there is no law to restrain the freest expression of the disapprobation that any person may entertain of what is done in or by the Courts. But liberty of the press is not to be confounded with license or abuse of that liberty.

*Per Woodroffe, J. (Chitty and Fletcher, JJ. concurring)*: All proceedings whether in respect of Civil or Criminal contempts are of a criminal nature when their object is to punish by fine or imprisonment. The procedure in such cases is not in all respects the same as an ordinary criminal case. Both the offence as also the jurisdiction and procedure under which it is tried are *sui generis*. As regards the question of proof, no case either Civil or Criminal should be tried and determined otherwise than according to the law governing it. There is but one rule of evidence which in India applies to both Civil and Criminal trials and that is contained in the definition of 'proved' and 'disproved' in section 3 of the Indian Evidence Act.

(1) (1883) L. R. 10 L. A. 171; I. L. R. 10 Calc. 109.

(2) (1913) 18 C. L. J. 452.

(3) (1867) 8 W. R. Cr. 32.

• *Westo v. Prary Mohan Dass* (1) referred to.

*Per Mookerjee, J.*: A Criminal contempt is conduct that is directed against the dignity and authority of the Court. A civil contempt, on the other hand, is failure to do something ordered to be done by a Court in a civil action for the benefit of the opposing party therein. Consequently, in the case of a criminal contempt the proceeding is for punishment of an act committed against the majesty of the Law, and, as the primary purpose of the punishment is the vindication of the public authority, the proceeding conforms as nearly as possible, to proceedings in criminal cases. In the case of a civil contempt on the other hand, the proceeding in its initial stages at least, when the purpose is merely to secure compliance with a judicial order made for the benefit of a litigant, may be deemed instituted at the instance of the party interested and thus to possess a civil character. But, here also, refusal to obey the order of the Court may render it necessary for the Court to adopt punitive measures against the person who has defied its authority: at that stage, at least, the proceedings may assume a criminal character. In this manner, the dividing line between acts which constitute criminal and others which constitute civil contempts may become indistinct in those cases, where the two gradually merge into each other.

The power to punish for contempt is inherent in the very nature and purpose of Courts of justice. It subserves at once a double purpose, namely, as an aid to protect the dignity and authority of the tribunal and also as an aid in the enforcement of civil remedies. The power may consequently be exercised in civil or criminal cases or independently of both, and either solely for the preservation of the authority of the Court or in aid of the rights of the litigant or for both these purposes combined.

A proceeding to punish for contempt has the essential qualities of a criminal proceeding, whether the proceeding is initiated primarily to vindicate the Court's authority or solely as a coercive and a remedial measure to enforce rights of the litigant or for both these purposes combined.

Where the sole purpose sought by initiating the proceeding is to secure the coercive and remedial action of the Court against a party, the Court may, nevertheless in its discretion, add a punishment by way of fine or imprisonment, for the failure of the person in contempt to obey its mandate. The proceeding must be regarded from its inception to the point of judgment as of a criminal nature, or, at least potentially so. It is the judgment which must eventually in any case determine the character of the proceeding.

Where the contempt consists in an attack upon the Court, the proceedings instituted to vindicate its dignity, are of a criminal nature, even though the attack has been made in connection with civil suits or appeals, either actually decided or pending or about to be taken up for disposal.

*Legal Remembrancer v. Matilal Ghose* (2) referred to.

*Woodroffe, Chitty and Fletcher JJ.*: One cannot escape either contempt or libel merely by alleging that there was a rumour.

Where the writer knew that proceedings were still pending, the fact that he did not desire or intend to prejudice the case, is immaterial (except as to the

(1) (1912) I. L. R. 40 Calc. 898.

(2) (1913) 18 C. L. J. 452.

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extent of his punishment) if the Court be satisfied that such was the obvious and necessary result of his words.

*Daw v. Eley* (1) ; *In re Martindale* (2) ; and *In re Townsend* (3) referred to. Objections should even when legal, have some relation to reality.

*Woodroffe, Mookerjee, Chitty and Fletcher JJ.* : The word 'record' in section 74 (2) of the Indian Evidence Act means collection of documents.

Secondary evidence of the returns filed under section 32 of the Indian Companies Act and in the custody of the registrar of joint stock companies, is admissible.

Returns in the custody of the registrar of joint stock companies constitute public records of private documents within the meaning of section 74, sub-section 2 of the Indian Evidence Act.

*Mookerjee J.* : Although secondary evidence may be admissible, the party who produces the evidence is not relieved of his obligation to prove the execution of the document, just as if the original had been produced, unless the case is covered by section 90 of the Indian Evidence Act or the legislature has expressly provided that the document or endorsement thereon is receivable in evidence without proof of execution, as, for example, in section 60 of the Registration Act.

The procedure should be at least equally strict and adherence to the forms of the law at least equally scrupulous, when the Court finds itself in the position of prosecutor and Judge and an unexpected lacuna in the evidence transpires during the trial. The Court must act with great caution in strict conformity with the requirements of the law and avoid a perhaps not unnatural tendency to supplement the evidence.

*Woodroffe, Chitty and Fletcher JJ.* : Whether directors of a company are responsible for contempt of Court, depends on the facts of each case.

*Mookerjee, J.* : It cannot be held as a matter of law, that the directors of a limited company which owns a newspaper, are liable to be committed for a contempt of Court on account of a libel published in the paper.

The weight of modern authority is that proceedings by way of contempt would lie against corporations as well as individuals : in the case of individuals, the process is by attachment of the persons followed by fine or imprisonment or both ; in the case of corporations, the process is by fine followed by sequestration or distraint.

*R. v. Birmingham Ry Co.* (4) ; *London v. Lynn* (5) ; and *Spokes v. Banbury Local Board* (6) referred to.

*Per curiam* : Refusal by the printer to give up the name of the editor is a matter which will weigh with the Court in determining whether a penalty shall be awarded against the printer or not.

Rule issued by the Chief Justice after consultation with other Judges of the High Court in consequence of two articles which appeared in the '*Amrita Bazar Patrika*' newspaper on the 18th and 22nd of May, 1917, respectively.

(1) (1868) L. R. 7 Eq. 49.

(2) (1894) 3 Ch. 200.

(3) (1906) 22 T. L. R. 341.

(4) (1842) 3 Q. B. 223.

(5) (1789) 1 H. Bl. 206.

(6) (1865) 11 Jur. N. S. 1010.

The Rule was issued on the Directors, Managers, and the Printer of the "Amrita Bazar Patrika" to show cause why they should not be committed for contempt of Court.

*Messrs. Jackson* and *C. C. Ghose* appeared for Babu Mati Lal Ghose.

*Messrs. Norton* and *A. N. Chaudhuri* for the Printer Tarit Kanti Biswas.

*Messrs. B. Chakravarti* and *K. N. Chaudhuri* and *B. K. Lahiri* for Babus Mrinal Kanti Ghose and Pijush Kanti Ghose.

*Messrs. C. R. Das* and *A. K. Ghose* for Babu Golap Lal Ghose.

*Mr. Jackson*.—I would ask your Lordships first with reference to this matter in what jurisdiction this Court is sitting? Your Lordships must not fancy that I am putting this without any reason. The whole of this was gone into in the case of *Tayler* (1) and it was held that it ought to be the ordinary criminal jurisdiction.

[*SANDERSON, C. J.*—We are perfectly ready to hear anything you wish to say on that point.]

Your Lordship has not given me the information I asked for.

[*SANDERSON, C. J.*—How is it you are entitled to ask me what jurisdiction we are entitled to exercise.]

There is no instance on record of a paper being filed in which the parties are not entitled to know in what jurisdiction it is. There are only three jurisdictions, Original, Civil and Criminal. That has been settled by the Privy Council. I wish to know in which of them the Court is dealing with this matter. It has been held repeatedly as a matter of fact if this is contempt of Court it is nearly a criminal matter and can only be tried on the Criminal Side. The first matter with reference to that question is with regard to the question of jurisdiction. The Charter simply creates a High Court, but the jurisdictions are all conferred by the Letters Patent. The first case on the point is *Navi Vapi v. Turner* (2). There the jurisdictions are distinctly stated. I may mention further I have got a verbatim copy of what took place before Sir Barnes Peacock, in the celebrated "*Englishman*" case (3). There the case was first started in the ordinary original civil jurisdiction. The first objection taken was that it could not be tried as such and eventually Sir Barnes Peacock said "I am quite ready to admit that." The Law has not been altered or the Charter or anything since those days.

(1) (1869) 26 C. L. J. 345.

(2) (1889) L. R. 16 I. A. 156.

(3) (1869) 26 C. L. J. 401.

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[FLETCHER, J.—Where is that reported ?]

It is not reported anywhere. I have got a verbatim copy. Sir Charles Paul argued the case with Mr. Kennedy and he corrected the transcript. I was present throughout the trial and I can assure Your Lordships that the report is absolutely correct.

[SANDERSON, C. J.—Would you mind telling me, Mr. Jackson, what is the point of this ? Do you dispute the proposition that if, supposing, this is a contempt of Court we have no jurisdiction to deal with it ?]

I am not disputing it if you do it in the proper jurisdiction. But it makes all the difference to me whether you are trying it in the Criminal or Civil Jurisdiction. I claim the right, if it is a criminal matter, to be tried originally and with all the advantages and disadvantages of a Criminal trial.

[SANDERSON, C. J.—I suppose sitting here we have every jurisdiction.]

No. I submit you cannot sit in five jurisdictions at the same moment. It makes all the difference in the world under what jurisdiction you are sitting. How can you sit in all of them together ? What would be the result ? It would be utterly impossible. It must be one jurisdiction or the other. It is a matter of the greatest importance. You find every single case in England that deals with this matter lays the greatest stress on the fact that it is a criminal matter. *Cities Legal Remembrancer v. Matilal Ghose* (1). I am entitled to know in what jurisdiction I am being proceeded against. There are a whole number of cases in regard to this. This disposes of all this about Courts of Record and so on.

[SANDERSON, C. J.—What do you mean by all this about Courts of Record and so on. I think Sir Lawrence Jenkins said that this Court being a Court of Record had power to commit for contempt.]

I am perfectly well aware of that. All I was going to say is that if the Bench of the Privy Council comprising Lords Watson, Macnaghten, Davis and Morris is right, the day is not far distant when they will rule that you have no power, that it is an obsolete power. I wish to draw your attention to *McLeod v. St. Aubyn*. (2)

[SANDERSON, C. J.—A year or two after that in England itself proceedings were taken against the proprietor of a newspaper for contempt of Court. Even in England itself the matter was not obsolete.]

(1) (1913) 18 C. L. J. 452.

(1899) A. C. 549.

The whole of this was gone into before Sir Barnes Peacock in the celebrated "*Englishman*" case (1).

[SANDERSON, C. J.—What is the point you wish to put now?]

To call attention to the decision in the case of *O'Shea* (2). I protest most respectfully that regularity with regard to these proceedings should be followed with the utmost strictness. That is the one thing which separates us from Courts in the mofussil. It is the absolute insistence in these matters which simplifies matters and does not impede justice in the least.

[SANDERSON, C. J.—I see the Chief Justice said it is quite immaterial which side of the Court the case is tried.]

Does your Lordship want anything more?

[SANDERSON, C. J.—I don't want anything which you don't want to give me.]

I want to know where I am.

[SANDERSON, C. J.—You will know where you are in time.]

Unless I know that I cannot place my points. Two of my next points depend on that.

[SANDERSON, C. J.—That is your first point. What is your next point?]

There is no point. I want to know what the jurisdiction is. In making the request I was doing nothing unusual. If you do not tell us in what jurisdiction you are sitting the best thing I can do is to sit down.

[SANDERSON, C. J.—If you have any more cases to cite you may do so, but you may assume this is a matter of a criminal nature.]

I will assume that I wish to cite *In re Edward Hutchinson Pallard v. The Chief Justice of the Supreme Court of Hong Kong* (3); *In re Maria Annie Davies* (4); and *The Metropolitan Music Hall Company v. Lake* (5). Assuming it is a criminal jurisdiction, the next point I am entitled to know is who is prosecuting. Furthermore the last Chief Justice and Mr. Justice Mookerjee dealt with that very point and Mr. Justice Mookerjee said that it was a matter of vital importance. One of the points in that case was that the Legal Remembrancer purported to be the prosecutor. As a matter of fact they repudiated the Legal Remembrancer as a person of comparatively no importance. He was dismissed from the case and the order of the Governor-in-Council was relied on.

(1) (1869) 26 C. L. J. 401.

(2) (1890) 15 P. D. 59.

(3) (1868) L. R. 2 P. C. 106.

(4) (1888) 21 Q. B. D. 236.

(5) (1889) 58 L. J. Ch. 513.

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I wish to know who the prosecutor is. If it is the two gentlemen, who filed the affidavits I know where I am, if not I must know who it is. This is a thing that cannot be postponed and I cannot assume. I want to know, first, who my opponent is, and, second what the charge is? Is it the whole Court or one Judge or two Judges or three Judges or some one wholly irrespective of the Court?

[SANDERSON, C. J.—Anything more on that point?]

No. In the absence of an answer to that point I cannot possibly proceed.

[SANDERSON, C. J.—Why not?]

Without knowing what the charge is how am I to meet it? Is not this significant of cases of this description? The fact is I hope the end of the war will see the whole of this sham disappear.

[SANDERSON, C. J.—What sham?]

The Court dealing with cases itself in which it is personally interested. I protest against going on further in this matter.

[SANDERSON, C. J.—We don't think you are entitled to ask questions of the Bench in the way you have been doing on these points but inasmuch as you assure us you will be hampered in your argument if you do not get certain information, we think it only right to give it to you although we do not think you are entitled to it. With regard to the question of the rule it was issued by me as Chief Justice of this Court after consultation with the learned Judges of the Court. I thought that would have been apparent from the proceedings which took place when the rule was issued. As regards the interpretation of the articles I should have thought that you would have had no difficulty in coming to the conclusion as to what was meant. But if you like I will tell you that. Our impression was that this contained a reflection on the Court in its administration. Among other things, it contained a suggestion that the Court was constituted for the purpose of hearing certain appeals with the object of counteracting a decision which had been given on a similar point by two other learned Judges of the Court, namely, Justices Mookerjee and Cuming. That is the broad idea. I don't want to use any unpleasant words but the suggestion was that the Court was to be constituted with the object of counteracting that decision. I have not read the articles this morning but my recollection is that the second article says: "Consternation has been caused by the fact that this Court will be constituted of the Chief Justice, Mr. Justice Woodroffe and Mr. Justice Chitty.]"

Mr. Jackson said that was one reason he asked whether this was an Original matter. If it was a Criminal matter there was no legal evidence of any kind connecting his client with this publication. If he was right he need not trouble their Lordships. He then cited *In the matter of a Special Reference from the Bahama Islands* (1).

[MOOKERJEE, J.—I thought you were taking the point that there was no legal evidence to connect Moti Lal Ghose with this publication.]

That is so. There is not one scarp of legal evidence to make him liable. I ought to be treated exactly as I was on the last occasion. It is not because the sun is hotter or cooler than on the last occasion that I should be treated differently now.

[MOOKERJEE, J.—Do you deny that you are a Director?]

I am an accused person. Your Lordship will pardon me if I refuse to make any reply.

[SANDERSON, C. J.—Does the affidavit prove whether he is a Director or not?]

To my mind it does not. But your Lordships have to decide that.

[FLETCHER J.—The statutory return shows he is a Director.]

That does not prove his connection with this publication.

[SANDERSON, C. J.—Is the statutory return an Exhibit in this case?]

Yes.

[SANDERSON, C. J.—What was the date of the return?]

March. This is June. It is no presumption that because you are married once you are married always. Is every Director supposed to be cognisant of everything that goes out from his office? If you think that is legal evidence well and good and I don't wish to address you further in the matter.

[SANDERSON, C. J.—I see he lives at No. 2 Ananda Chatterjee's Lane. That is also the registered office of the Company.]

Mr. Jackson said that there were two more cases he wished to cite. One was *R. v. Stanger* (2). The other was *Rex v. O'Connell* (3).

Continuing Mr. Jackson referred to clause 13 of Letters Patent and said that the question was whether contempt of Court should be

(1) (1893) A. C. 138.

(2) (1871) L. R. 6 Q. B. 352.

(3) (1844) 5 St. Tr. (N.S) 1 (Column 1877).

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punished under any other provision except that under the Penal Code. He cited *Hallmark's case* (1) and said that because a man happened to be the director of a company he was not supposed to know what appeared in the paper. There was no legal evidence on which he could be punished for this supposed contempt. There was no disrespect to a Court of Justice which impeded the administration of justice and which could be punished as contempt.

Mr. Jackson next proposed to deal with the articles but before he did so he proposed to refer to the circumstances of the time under which they were written. What was the state of things when these recoupment proceedings by the Calcutta Improvement Trust began?

[SANDERSON, C. J.—Do you mean these three recoupment proceedings which came up on appeal?]

*Mr. Jackson.*—No. If your Lordships allow me I will deal with it in my own way.

[SANDERSON, C. J.—How are we to go on with other proceedings not before us except on affidavit?]

There are materials before the Court.

[SANDERSON, C. J.—We can't go on hearsay evidence.]

Your Lordship yourself will not be able to deal with this case without going outside the record.

[SANDERSON, C. J.—Can't you confine yourself to the proceedings of this Court?]

I will refer to *Chandra Kanta's* case in the lower Court.

Continuing, Mr. Jackson said that prior to the appeal in *Chandra Kanta's* case Mr. Justice Greaves dealt with some other Improvement Trust cases. Mr. Bompas placed the matter in the hands of his legal adviser. In the meantime Mr. Justice Greaves delivered judgment before the appeal in *Chandra Kanta's* case was heard by a Divisional Bench of this Court. That appeal came on for hearing before a particular bench consisting of Justices Mookerjee and Cuming. For some particular reason the Improvement Trust was not willing that the appeal should be heard by that particular Bench.

[SANDERSON, C. J.—I don't know that.]

On the 30th May an application was made by Mr. Langford James before your Lordship to have the appeal heard by another Bench.

Continuing, Mr. Jackson said that the Improvement Trust wanted to get out the appeal from that Bench by taking postponements and

(1) (1878) L. R. 9 Ch. Div. 329.

before the three appeals from Mr. Justice Greaves' judgment were heard they got leave to appeal to the Privy Council in *Chandra Kanta's case* (1). Then the three appeals were heard and Counsel understood that a Full Bench would hear them again. Then why should not the writer bring it to their Lordships' notice that this matter should go to the Privy Council? Why should the parties be put to unnecessary expenses by appointing a Full Bench?

[SANDERSON, C. J.—Will you draw my attention to that part of the article where the Privy Council is referred to?]

These words are not used but it means that Indian Judges approach the subject from a totally different point of view from that of European Judges who don't possess an inch of land and don't know where the shoe pinches, while in England every member of the judiciary holds land.

Mr. Jackson next said that the article began thus: "There is a mischievous rumour afloat, which should be contradicted." Was there anything to suggest that the Improvement Trust was trying to remove any particular Judge?

[SANDERSON, C. J.—I should think that the tradition of this Court is such that every body should know that and it requires no contradiction.]

I know of one case in which a particular Judge was removed during the hearing of the Purnea case at the instance of the Lieutenant-Governor.

[SANDERSON, C. J.—That is not possible at present. It is absolutely impossible now to get a Court of one's own liking. If there is any such rumour it should be treated with contempt and should not be published.]

Mr. Langford James made the application for the transfer of the appeal.

[SANDERSON, C. J.—That application was rejected but it was not an attempt to choose one's own Bench.]

Mr. Jackson said that their Lordships should consider the circumstances under which the article was written. It next said "It is stated that a vigorous attempt is being made to get up a Bench to consider the appeal on the judgment of Mr. Justice Greaves in connection with the acquisition of surplus land by the Calcutta Improvement Trust according to somebody's choice." The writer did not believe the rumour and he wanted to contradict it. People outside this Court did not understand the difference between appeals from lower Courts and appeals from the Original Side of this Court.

(1) (1916) 24 C. L. J. 246.

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They thought that because one Improvement Trust appeal was heard by Justices Mookerjee and Cuming the other Trust appeals should also be heard by that Bench. The article next referred to the Mookerjee and Cuming Bench and this, Counsel thought, was the worst part of the whole thing.

[SANDERSON, C. J.—The article says that a serious attempt is being made by the Chairman of the Improvement Trust to get up a Bench as a counterpoise to the Mookerjee and Cuming Bench.]

What is said is that the rumour is that an attempt is being made in that direction but the writer does not believe it.

Counsel next referred to the second article which began thus "Something like consternation prevails on account of the proposed new constitution of the Appellate Bench." It said that originally the Bench was composed of Justices Mookerjee and Cuming and latterly it had come to be presided over by the Chief Justice Mr. Justice Woodroffe and Mr. Justice Chitty. This was based on absolute mistake. There was nothing affecting Mr. Justice Chitty.

[SANDERSON, C. J.—Why a Bench consisting of the Chief Justice and Justices Woodroffe and Chitty would cause consternation ? ]

After the application made against the previous Bench which heard Chandra Kanta's appeal this would create consternation. The writer suggested to appoint a Judge who possessed land and the suggestion was made from a totally different point of view.

[FLETCHER, J.—The Improvement Trust wanted to have their cases decided by a particular Bench and the Chief Justice would not consent to that, what does it mean ?]

[SANDERSON, C. J.—The meaning is obvious Mr. Jackson.]

Continuing Mr. Jackson said that the article went on to say that Indian Judges were likely to know more of conditions and practices prevailing here and it suggested to appoint an Indian Judge on the appeal Bench. Counsel said that the Improvement Trust was a Government institution and that being so it was natural that there was suspicion and the only way to impress confidence was to take one who possessed land. The writer had perfect faith in the Chief Justice and he said "We have perfect faith in the present Chief Justice." Certainly this was not contempt. Counsel failed to see any contempt in the two articles. Sir Barnes Peacock in the reported case conceded that it was a matter which could be differently interpreted. There was not a single reported case which could approach this in weakness for the matter forming the subject of contempt.

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*Mr. Norton* who represented Tarit Kanti Biswas, printer and publisher of the "Amrita Bazar Patrika," said that *firstly* this was not contempt of Court, *secondly* even if it was so, whether it was desirable to take cognisance of it in this way and *thirdly* what portion of the guilt was attributed to his client?

Counsel said that the position of the printer was quite different and he deserved more sympathy. He was merely a paid servant and had nothing to do with the policy of the paper. His business was to see that the matter was printed and published.

[SANDERSON, C. J.—It has been held that the printer is also responsible.]

*Mr. Norton*.—Yes. If it is held contempt then he is unable to escape the legal liability but he is worthy of pity.

[SANDERSON, C. J.—Is it not a fact that the directors live in the same house where the paper is published?]

I don't know that.

[SANDERSON, C. J.—Can you say who wrote the article?]

The printer does not know that. It does not concern him.

[SANDERSON, C. J.—Apparently the printer printed it at a place where the directors live. They are all living together in the same place.]

It does not contribute to my knowledge of knowing the identity of the writer. I was simply printing the paper and I don't know who wrote it. There is internal evidence that it was not written by a European.

Continuing *Mr. Norton* referred to the two articles and said that rightly or wrongly the Improvement Trust thought that Mr. Justice Mookerjee's judgment was wrong. This was the rumour and the article described it as mischievous and the writer wanted to contradict it. Counsel admitted for the purpose of his argument that it was a gross libel against the Improvement Trust but it was not contempt against the High Court.

[SANDERSON, C. J.—Observed that when the writer spoke of consternation what could he mean but that he had lost his confidence in the Judges.]

*Mr. Norton* asked his Lordship not to read the two articles together.

[FLETCHER, J.—Is it not contempt to speak of consternation as regards constitution of any particular Bench?]

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*Mr. Norton.*—I say no.

Continuing, Mr. Norton said that the grievance of the writer was why there should not be a Full Bench and only a Bench of three Judges. If he was acquainted with the form of proceeding he should have said that as there was a difference of opinion it should go before a Full Bench.

Mr. Norton next said that the writer said that it was a matter for regret that there was an unsavoury impression because it was untrue. How could it be contempt when he spoke of unqualified belief in the Bench. That was the key of the whole thing. He only asked to take in an Indian Judge.

Continuing, Counsel said that if it was held contempt he asked their Lordships not to take any notice of it and that summary jurisdiction should not be followed. A contempt out of Court should not be treated summarily unless it interfered with the administration of justice. The Trust got all they wanted to get but the writer did not create any impediment. If it was only scandalising the Bench then Counsel said this class of contempt was practically obsolete. The position of an English Judge was too high to be shaken by criticism like this. The reason why the summary procedure was not desirable was that the prosecutors were the witnesses and Judges. In the case of *Taylor* (1), Sir Barnes Peacock wanted to issue a rule and there was an apology.

[SANDERSON, C. J.—The writer of this article has offered no apology.]

How can I offer apology for the writer?

*June, 12.*

*Mr. Norton.*—Before proceeding with my argument I would like to call your Lordships' attention to a statement in the newspapers that I tendered a heartfelt apology for the Printer. I tendered no apology heartfelt or otherwise because I understood your Lordships agreed with me that in the position in which I was placed it was impossible for me to apologise for another man's acts. That was the reason I tendered no apology. Had the word been my own words I should have tendered an apology at once but in the circumstance I can scarcely be called upon to apologise for another man's acts.

[SANDERSON, C. J.—I don't see why your client should not apologise just as much as any body else.]

What I stated on Monday and I repeat again today is this: If your Lordships think that I have not exercised due caution and was negligent in the discharge of my duties as Printer, I do

offer an unqualified apology with an expression of my regret. My argument however is that in truth and fact there is no contempt.

Counsel then cited *King v. Freeman* (1) and said that in the sense in which reflection constitute an impediment to the due administration of justice the reference in that case was whether there had been a contempt or suggested contempt to influence the mind of jurors or to intimidate witnesses from coming forward to assist either side.

[SANDERSON, C. J.—That is not an authoritative proposition that there must be an actual impediment. The test is this whether a matter has a tendency to obstruct the ordinary course of justice, not that there was an actual disturbance of justice.]

That case is not applicable to Judges but to jurors. I draw a logical differentiation between proceedings calculated to influence the minds of jurors and an attempt to influence the minds of learned Judges.

[SANDERSON, C. J.—You mean to say a juror's mind will be more easily influenced?]

Yes. Our contention has always been that we cannot substitute trial by Judges for trial by jury on the ground that your Lordships are not accessible to influence which we as Counsel can plead before a jury.\*

Counsel then cited the case of *King v. Dolan* (2) and said that that was the case which Sir Lawrence Jenkins followed and quoted in *Legal Remembrancer v. Mati Lal Ghose* (3). There it was held that the Court should not act unless in fact the contempt was likely to create a tendency to obstruct the course of Justice.

— [SANDERSON, C. J.—It is the same thing. Does the addition of the word "fact" add anything to the principle?]

I submit it does.

[SANDERSON, C. J.—If you say anything has a tendency to create is it not the same if you say a thing has in fact a tendency to create? You are a master of English. Tell me that! Do you really add anything to the weight of the sentence if you say that has a tendency to create a prejudice or that has in fact a tendency to create a prejudice?]

The difference is this. It is a remote contingency upon a very remote contingency. It is a mere possibility upon a possibility. Whoever wrote these articles was not seeking to influence the minds of jurors. If he was seeking to influence any minds he

(1) (1902) 2 I. R. 82.

(2) (1907) 2 I. R. 260.

(3) (1913) I. L. R. 41 Cal. 173 ; 18 C. L. J. 452.

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was seeking to influence your Lordships' minds not upon the merits of the appeal but on the constitution of the Bench. How can that have a prejudicial effect upon your Lordships' judicial determination of the merits of the appeal. I submit that cannot have the least influence upon your Lordships' minds. If it was a libel upon the Improvement Trust the only influence upon your Lordships' minds would probably be to create a bias in favour of the Improvement Trust. It indicated nothing as to what your Lordships ought to do. He asked for the constitution of a Bench which should include one or more Indian Judges. Can it be said there was any danger real or imaginary in an application of this kind?

Counsel next cited a case *In re Clement* (1), and the case of *Hunt v. Clarke* (2).

[SANDERSON, C. J.—The test is first whether it tends to prejudice.]

I am willing to apply that test here. No attempt was made by the writer to prejudice your Lordships' minds as to the merits of the appeal. What was there in the nature of urgency in the articles which are now the subject-matter of this enquiry—urgency in the shape of your Lordships' summary interference. Apparently, as far as one can see, they avoided any further comment not in consequence of any order of this Court but spontaneously. There was nothing really in the nature of any urgency to correct any mischief of that kind which was likely to spread and create more serious mischief in consequence of that dissemination, to justify the exercise of that jurisdiction which is exercised and which should be resorted to only in cases of extreme urgency.

After citing *In the matter of a Special Reference from the Bahama Islands* (3) Mr. Norton said that however wrong it might be it could not be stated that the articles in question were an obstruction to public justice. The writer could not have believed that anything he said in these letters would in any way obscure their Lordships' minds or divert them from the proper functions of the Bench. If the object of these proceedings be to make it quite clear that their Lordships had the power which they were desirous of exercising in this case, to hold it was contempt, and exercise their control over that contempt by the summary process with which their Lordships were clothed, what would be the outcome of these proceedings? He was only addressing their Lordships on behalf of the Printer, who was comparatively speaking the least blameable. There was no suggestion whatever that he was aware of the contents

(1) (1877) 46 L. J. Ch. 375.

(2) (1889) 58 L. J. Q. B. 490.

(3) (1893) A. C. 138 (148).

of the documents, and he had sworn himself that he had no such knowledge.

[SANDERSON, C. J.—I was looking at his affidavit this morning. Would you mind looking at paragraph 4 where he says "I did not read the said articles or either of them when they were given to me for publication." Now turn to paragraph 6 where he says "I further state the said articles were published by myself in good faith and in the public interest." How can he say that he did not know what was in them?]

A man may in perfect innocence publish a document of which he knows nothing believing at the time that it is perfectly innocuous. What he means is this that if he had any notion that these documents contained anything of an objectionable character he would not have published them. It is true that he did not read them because he believed that no defamatory matter would be given to him for the purpose of publication.

[FLETCHER J.—How can he say it is in the public interest if he did not read them.]

Publication in a newspaper involves publication of matters seventieths of which, I presume, is of public interest.

[SANDERSON, C. J.—He says "The said articles were published by myself in good faith and in the public interest." That seems to me somewhat inconsistent with the statement that he put in the articles without knowing what was in them.]

Then his drafter must be made liable for that. I knew what was intended by those responsible for the drafting. Those who drafted that meant to say in paragraph 4 that he never read the articles and in paragraph 6 that although he never read them he published them in good faith and in the public interest. These are the articles with which he stands charged. He did not read them because he *bona fide* believed he was asked to publish that which was for the public interest. He is not there for the purpose of printing for private circulation but for the public. They are not printed to sell to Mati Lal Ghose's children but to the public.

[SANDERSON, C. J.—They are to sell the paper.]

Who buys it? The public. In paragraph 4 he says I never read them. In paragraph 5 he says I have now read them and I have ascertained that they contain misstatements of facts. In paragraph 6 he says although I published them without reading them I acted in good faith and in the interest of the public business. I believed that the authorities in charge of the paper would not ask

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me to disseminate a libel. If as a matter of fact your Lordships' object is to give a warning effective in its character, that statements of this character are contempt and are not to be published then that object has been achieved by this enquiry. There is no reason why punishment should be noted out to the printer if your Lordships hold that these articles are really contempt. I would entreat your Lordships not to do that. There is an interval of four days between the publication of these two articles. I don't think it is too much to suggest that a man who read the article of the 22nd would necessarily keep in his mind the contents of the article of the 18th. There is nothing to show that the writer intended the two letters to be read conjointly or that the public on reading the second would take into consideration the contents of the first.

Continuing *Mr. Norton* said that so far as his client was concerned he was a subordinate servant who carried out duties more or less of a technical character and he had no interest whatever in the publication of these letters. Further he relied on his superiors not to put him in any jeopardy by publishing articles which were objectionable. He had simply carried out his duties efficiently and loyally to his superiors. He had sworn that he had never read these letters before he published them. If through no act of his own he became an innocent agent in the distribution of that which their Lordships might hold to be a contempt of Court, then that fact would play a very important part in the adjudication of punishment.

[SANDERSON, C. J. asked whether it had not always been in the cases *Mr. Norton* had cited a factor to be taken into consideration by the Court that the printer was willing to disclose the name of the person who brought the matter complained of to him for publication]

*Mr. Norton* replied that there was no evidence whatever that his client was aware of who wrote these letters.

*Mr. Norton* continuing said that it was not a fair interpretation to put on these letters by reading them together. There was nothing to show that the writer intended these two letters to be read jointly or that the publisher intended that the contents of the first letter should be taken into consideration in reading the second. The printer was entitled to rely on his superior. He simply carried out his duties under the orders of his superior and he never read these letters either before or after the publication and he was at best an unwilling agent in the dissemination of this libel. The whole circumstance showed that he was innocent of any complicity on his

part or that he was going to publish anything which he had reason to believe was injurious. That must be taken into consideration in the question of punishment. There was no evidence to show that this man knew who wrote these letters.

[SANDERSON, C. J.—In the ordinary course of business I suppose he would know from what quarter these letters came. He must have known who was responsible for the publication.]

They came to him in the ordinary course of business from one in the office.

[SANDERSON, C. J.—This person would be liable for the publication.]

I say I do not know who brought it. Supposing a messenger boy brought it.

[SANDERSON, C. J.—He would know from what quarter the messenger boy came. He would know who would be responsible. I want to reach the man who is responsible for the publication.]

The person responsible for the publication is the Editor.

CHIEF JUSTICE.—I suppose your client would know who is the Editor.

Yes. If your Lordships put me into that position I say I refuse to say. If the Editor has any virtue he ought to have come forward himself. Why should a subordinate on Rs. 20 a month be called upon to appear on this Rule. The other man is in a far higher position. Why don't the Editor and proprietor come forward and assume responsibility? Your Lordships will not press me to tell you who.

[SANDERSON, C. J.—Please understand me I do not press you to tell. This is one of the facts that must be taken into consideration, he must know who the Editor is.]

That is asking me to play the part of Judas.

[SANDERSON, C. J.—I shall bear in mind what you say about the Editor not coming forward.]

The counsel in conclusion referred again to the *Englishman Defamation case* (1).

*Mr. B. Chakravarty* appeared for Pijush Kanti Ghosh, a director of the company and for Mrinal Kanti Ghosh who was the Secretary to the Board, and said, that after the discussion which has already taken place, his own submission would be very short. His first submission was that in a criminal contempt, where the object of the procedure was to punish a man the gravamen of the charge was

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that the comment or publication interfered with or was likely to interfere with the due administration of justice. He filed two affidavits, one by each of his clients. With regard to the interference with the administration of justice or tendency to interfere with the administration of justice his further submission was that this might be mixed up with the reflection on the Judges or a reflection upon one of the parties to the litigation. If it was merely a reflection upon one of the parties and was in the nature of a libel but that it did not interfere or tend to interfere with the due administration of justice then the remedy by a summary process of contempt did not apply. In the same way if it was an attack, however improper or a reflection upon the Court, but that such reflection or attack did not interfere or tend to interfere with the due administration of justice then again the remedy was not by summary process of contempt but by criminal information or by action. His next submission was that in a case of an original trial pending whether it was a criminal proceeding or a civil action, any comment with regard to such pending proceedings or pending action, either on the merit or with regard to the conduct of the parties was *prima facie* likely to interfere with the administration of justice, because it might interfere with the witnesses who had to give evidence, or might interfere with the jury who had to deal with the facts, or might even interfere with the learned Judge dealing with the case. That is to say it might interfere with an impartial trial. If on the other hand the litigation has passed out of the hands of the trying court, even where an appeal is allowed on facts the position was different because the record was complete. No comment could interfere with the witnesses because *ex concessis* all the evidence was before the court and the verdict of the jury was also before the court. If the case was an appeal on facts and there might be a necessity to investigate the facts, it might be conceivable that one of the parties to the litigation was held up in contempt or pointed to as being unworthy of belief, then it might affect the mind of the Judge in dealing with the facts of the appeal. In the case where a Judge is concerned matters were not in the same position. Where it was a matter of a construction of a statute then his submission was that even if there was a comment with regard to the conduct of one of the parties it could not possibly interfere with the due decision of the appeal. If these two articles were offensive and therefore matters which contained reflections on either of the parties to the appeal or upon the learned Judges, his submission was that however reprehensible the attack of the writer might be, it could not possibly interfere

with the right decision of the appeal. It was not a question of facts. It was one which involves entirely the question of law which was to be determined upon the basis of the construction to be put upon a statute. Assuming that the articles were offensive, and that they were grossly libellous yet they could not attack the administration of justice because in point of fact the question involved was of such a character that the decision could not be affected by any comment made in the public press.

[SANDERSON, C. J.—What do you mean by due administration of justice? Is it only confined to the right decision of the case? Is it not necessary that this Court should have the confidence of the people in this country? Assuming that the articles are absolutely unjustifiable and are intended to minimise the confidence which the people ought to repose in this Court is that not a contempt of Court?]

That may be. I will make my submission with regard to that later on but what I want to clear up at the present moment is that these articles however offensive they may be and whatever action it might be necessary to take in regard to them, could not in the present case affect the due administration of justice in the sense of a proper decision of the appeal. Whether it was a mere reflection upon the dignity of the particular Judge or whether it was anything more, the proper remedy was not a summary process. This remedy by a summary process was only to be resorted to if the reflection upon the Judge did in fact interfere with or had a tendency to interfere with the due administration of justice.

Counsel then cited the case of *Helmores v. Smith* (1) and referred to Halsbury's Laws of England Volume VII page 231.

[SANDERSON, C. J.—That is exactly the point I was putting to you that it is calculated to undermine or impair the authority of the tribunal.]

*Mr. B. Chakravarty*.—Undermine or impair with regard to a list pending before the Court.

[WOODROFFE, J.—Supposing the list has already come to an end.]

You are entitled to criticise and in doing so to point the learned Judge is wrong.

[WOODROFFE, J.—Supposing the writer imputes corrupt motive to the Judge after the list is over.

(1) (1886) 35 Ch. D. 449.

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I have not considered this particular case but my answer to that would be that such a matter would not be dealt with by a summary process but by a criminal section for libel. The position would be the same as if you defame and maliciously or otherwise impute misconduct. I may have stated my proposition too broadly but still my first point remains. Assuming that the matter is pending then my submission is that it is not an attack on the Judges but an attack on the parties. However reprehensible it may be the right procedure is not by a summary process of contempt.

In this particular instance my submission is that this is a matter in which these offensive articles could not possibly interfere with the right decision of the case.

Counsel then dealt with the point as to whether it was libel against the Judges and cited *In the Matter of a Special Reference from the Bahama Islands* (1). The nature of the libel contained in the letters was not of such a character as to undermine and impair generally the dignity of the Court. In that case their Lordships held that it did not constitute contempt.

[SANDERSON, C. J.—That is to say that it did not undermine and impair the authority of the Court. Surely if the Privy Council had come to the conclusion that this letter had impaired or undermined the authority of the tribunal it must have come to the conclusion that it was contempt of Court.]

*Mr. Chakravarty* submitted that it was not such a contempt of Court as required that it should be proceeded against by summary process. What he was insisting upon was although it might be contempt of Court it did not necessarily mean that the remedy was a summary process by contempt.

[SANDERSON, C. J.—That must be a matter of discussion.]

*Mr. Chakravarty* agreed that it was a matter of discussion but even assuming that it was contempt of Court in so far as it cast a reflection on the Court it was not a proper case in which their Lordships should apply a remedy of a summary procedure.

Counsel then read the affidavit he had put in. One of his clients was a director and the other was Secretary of the company and both said that they had no control over the paper. They did not know who was responsible for the publication of the two letters in question.

[FLETCHER, J.—The directors must know. Where you

(1) (1893) A. C. 138.

delegate your power to conduct a newspaper you must know who the responsible Editor is.]

*Mr. Chakravarty* submitted that it being in the nature of a criminal trial, there was no positive proof before their Lordships to connect his clients with these two articles. He cited *Odger on Libel and Slander* 472, *R. v. Judd* (1). *Palmer on Company Precedents*, first volume, 11th Edition page 546.

[WOODROFFE, J.—Is not there against you presumptive publication? Either you bring forward evidence which rebut presumption or there must be presumptive publication. Consider this case from this point of view. A director is a person who directs. Then the question is what does he direct. He directs the business. This particular business is the carrying on of newspaper. Would not there be presumptive publication against your clients. You seek to meet it in two ways (1) that you had no control over the paper (2) by saying that you were not present. Apart from your allegations in the affidavits that you have no control over the contents of the paper and apart from your statement that you were away from Calcutta would not these facts referred to constitute a case as a presumptive publication.]

In law there is no presumption.

[WOODROFFE, J.—Why not?]

The Corporation is the proprietor. Supposing there are 20,000 share-holders in the country. Because I happen to have one share in such a company you cannot attribute to me knowledge of the publication of the article as proprietor.

[WOODROFFE, J.—There would be inference unless and until you show that you were not concerned with the publication.]

I say that such an inference does not arise in a criminal trial. You have to prove by positive evidence either that I was the writer or that I authorised the publication of it.

You cannot attribute to me the liability of the proprietor. In the case of editors and printers whether they do in fact know or not the law attributes *scienter* to them because it is in fact their business to know. Although they may be ignorant they cannot take shelter in that ignorance.

Counsel cited the case of *Regina v. Judd* (1) and went on to say that in the absence of proof of individual complicity his clients could not be indicted. It was absolutely necessary to show their complicity in regard to the offending matter. He then cited *Legal Remem-*

(1) (1888) 37 W. R. (Eng.) 143; 16 Cox. 559.

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*brancer v. Matilal* (1) and *R. v. South Staffordshire Water Works Company* (2). Except in the case of editors, proprietors and printers they could not rely upon any presumption or inference. They must prove it by positive evidence. He then cited *The Queen v. Holbrook* (3) and Odgers p. 470.

Continuing he said that with whatever disfavour or disapprobation they viewed the matter he submitted that there was no evidence for the purpose of establishing the complicity of these two men. It was no doubt very impertinent advice given by ignorant men with regard to the formation of a Bench for the trial of a particular matter.

[FLETCHER, J.—Are the readers equally as ignorant as the writer.]

There is nothing on the record and I should not like to say. If you think that very much importance attaches to newspaper articles you are very much mistaken. We here do not attach any importance to newspaper articles.

*Mr. Chakravarty* said that it seemed to him to be a very impertinent suggestion made by an ignorant person who says that he knows all about how the High Court Benches were formed.

[SANDERSON, C. J.—You can hardly say that. He seems to know what is happening in the High Court. He also knows that Mr. Justice Chitty was to be one of the Judges sitting on that Bench. How he came to know that I do not know. Therefore he could not have been very ignorant.]

My submission is that the matter being an appeal pending at the time involving a dry question of law it could not interfere with the administration of justice, and there could be no tendency to interfere with the due administration of justice. Notwithstanding my clients' position one as a director and the other as Secretary we have no control over the contents of the paper and we have in no way been shown to be liable for these offensive matters.

Under the Companies Act, Section 32, Clause L, the names and addresses of the directors or managers were to be furnished. In the return Mrinal Kanti Ghose was described as the Secretary and Golap Lal Ghose as the financial manager.

[CHITTY, J.—Mrinal is both Manager and Secretary.]

He is only Secretary.

[SANDERSON, C. J.—In the Exhibit he is described as Manager and Secretary.]

In his affidavit Mrinal says he is Secretary and not Manager.

(1) (1913) 18 C. L. J. 452.

(2) (1885) 16 Q. B. 359. (364).

(3) (1877) 3 Q. B. D. 60; (1878) 4 Q. B. D. 42.

[SANDERSON, C. J.—If he was Secretary alone he would not have been put in the category of Manager in the return.]

The return was made by Golap and not by Mrinal. Although he is put under the heading Manager he is only Secretary.

Counsel next cited *Exp. Green* (1) in which Robins, manager of Press Association, was prosecuted in connection with the alleged publication of a paragraph in the papers sent by the Press Association. His position was, according to his own showing, that he was in charge of the various departments.

[SANDERSON, C. J.—Here we have got the printer. He simply prints what is given to him. The Director has no control over the matter that appears in the paper. Then who are we to hold responsible for the publication?]

Under the law the printer is responsible.

[SANDERSON, C. J.—If we are left in the dark we must draw our own inferences. What are we to assume? The director says he does not exercise any control. Then there must be an editor.]

All I can say is that he is not before your Lordships. You can condemn my action for keeping my mouth shut but you can't punish me for that.

[SANDERSON, C. J.—But they have not suggested that there is an editor.]

*Mr. Chakravarti*.—We have not made any such suggestion. I am not here to give any information.

*Mr. C. R. Das* who represented Golap Lal Ghose, said that his client was director and financial manager. The first question which must be determined was whether this was a criminal proceeding or not. On their Lordships' decision would rest other questions. He did not like to raise the question of jurisdiction but that was a substantial question in the case. Once he established that it was a criminal proceeding it required evidence to prove the charge. Counsel said there was no evidence against his client. The materials upon which this rule was granted did not call for an answer from an accused person.

Counsel next preceeded to show that it was criminal proceeding and cited the case of *O'shea v. O'shea* (2). That was a divorce suit and in connection with that suit a newspaper published something which formed the subject matter of contempt. In that case it was held that that was a criminal proceeding. In the case of *In re Davis* (3), it was also held that the proceeding was criminal. In

(1) (1891) 7 T. L. R. 411.

(2) (1890) 15 P. D. 59.

(3) (1888) 21 Q. B. D. 236.

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*Legal Remembrancer. v. Matilal* (1) it was held that whatever might be the character of the contempt it must be considered to be a criminal proceeding.

Counsel next said that once it was admitted to be a criminal proceeding, the next point was what was the evidence against his client. He pointed out that in a criminal proceeding they must have absolutely clear proof. That which was accepted as *prima facie* proof in a civil action was no proof in a criminal proceeding.

Mr. Das next cited *Martin v. Mackonochie* (2) and *In re Holt* (3) and quoted from Woodroffe's Evidence that the question was not whether substantial justice was done but whether justice was done according to law. In accepting evidence they must be satisfied that it was according to law. Then they could not draw an inference in conformity with his guilt but in conformity with his innocence. In a criminal proceeding the inference must be drawn which was mostly in favour of the accused.

Continuing Mr. Das said that the return filed by the Secretary of the Company giving the names of the directors and managers being a private document must be strictly proved as to handwriting and signature. Therefore the production of a certified copy was of no use. He then read sections 74 and 65 of the Evidence Act and sections 31, 32, 40, 240 and 248 of the Indian Companies Act and said that that was not a public record. It was a private document. It was sent to the Registrar but that did not make it a public document.

[MOOKERJEE, J.—Is it a public record of a private document?]

No. I say that it is a private document.

[FLETCHER, J. referred to section 87 of the Companies Act and asked as to whether it was not a public document.]

How is it a public document? Public record means any record which is concerned with the public.

[SANDERSON, C. J.—The public are entitled to get copies of the document by paying certain fees?]

Yes.

[SANDERSON, C. J.—Then is it not a public document?]

The whole question is whether it is a public record—what does the expression “public record” mean? Section 87 as it is worded does not make this document a public document.

[SANDERSON, C. J.—Is this copy of which this document purports to be a certified copy, made under section 87 of the Companies Act?]

(1) (1913) 18 C. L. J. 452.

(2) (1878) 3 Q. B. D. 730.

(3) (1879) 11 Ch. D. 168.

\* No. Under section 32 of the Companies Act. The affidavit says that.

*Mr. Das* then read Clause L of section 32 of the Companies Act and said that they were to send that information to the Registrar, who, under the Act, had some power of supervision over the Joint Stock Companies. There were many documents of which they could get copies, but those could not be regarded and never had been regarded as public documents. If in pursuance of section 32 of the Companies Act, the copies being sent by them to the Registrar's office, the office had to do something and to keep some records of those documents, these copies would be public records of private documents. The mere fact that these copies were sent and the Registrar's office kept copies of them, this did not make those copies public documents. The Registrar's office was only the custodian of those documents under the Act.

*Mr. Das* continued : Section 87 of the Indian Companies Act which Mr. Justice Fletcher mentioned, referred to a totally different document, not the one referred to in section 32 of the Indian Companies Act. The document with which their Lordships were now concerned was a document mentioned in section 32 and not in section 87. That would bear on the next question he would argue as to the presumption that if they were Directors in March they were Directors in May. The certificate filed stated the facts as they stood on the 5th March.

[SANDERSON, C.] —Look at the end where it states "filed this 9th day of May."]

I see that. Your Lordship will allow me to deal with it after I disposed of the first point. The question which your Lordships have got to decide first of all in this connection is whether it comes under Clause 2 of section 74 of the Evidence Act as to whether it is a public document or not. I submit the words "public record" show it must be a record made of private documents when they are sent on to the Registrar's office. What the legislature contemplates is that unless some record is directed under the law to be kept of those documents it cannot become a public record of private documents. This is the view which Mr. Justice Woodroffe takes in his book on the Law of Evidence at page 517 (reads). Therefore, your Lordship's view is that it must be a record kept in the Registrar's office, made in the Registrar's office, and that the record is to be a record of or relating to private documents. Something has got to be done by the public officer with reference to that document—a

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note or entry or something which will make that document a public document.

CHITTY, J.—What meaning do you put on the word “record” in that section? Do you mean to say there must be some writing by the public official?]

Yes. I shall show your Lordships that that is the view of eminent authorities in England on public documents

Counsel then cited Taylor on Evidence, Vol. II, 10th Edition, page 1073, Powell on Evidence, 9th Edition, page 271, Lord Blackburn's judgment in the case of *Sturla v. Freccia* (1), and *Mercer v. Denne* (2) and said: That is my submission on the point that this is not a public document. If it is not a public document Exhibit “F” is not admissible in this case and if it is not admissible there is no evidence of any kind in this case. There is no inference of any kind.

[MOOKERJEE, J.—Assume secondary evidence is admissible what is your point?]

I submit the certified copy does not prove the signature. There must be evidence before your Lordships that the signature appearing on the original is the signature of the accused before your Lordships, and there is absolutely no evidence of that. Section 77 is not a section which would authorise the reception of this evidence without proof that the signature upon the original is the signature of this man.

[SANDERSON, C. J.—For the purpose of this part of your argument you would take the certified copy as if it were the original?]

Yes. They are entitled to put in the certified copy without proof of the loss of the original. Section 77 merely says it is to be taken as proof of the contents, that is word for word it is the same as the original.

[MOOKERJEE, J.—You would take this objection even if the original was exhibited?]

Yes. There must be evidence that the signature is the signature of this man. I can find no authorities according to which you may take the certified copy not only as proof of the contents of the original but over and above that as proof of the signature of the particular man before your Lordships.

[SANDERSON, C. J.—If we find that there is a statutory return is there not some inference to be drawn from the fact that the man's name appears there as Director of the Company?]

The farthest you can go is that a man of that name was Director

(1) (1880) 5 App. Cas. 623.

(2) (1905) 2 Ch. 538.

or Financial Manager. In an original trial you must prove the identity of the accused.

[WOODROFFE, J.—Why do you come before us?]

Because notice is served upon me. I would have been most happy not to have come.

[WOODROFFE, J.—As what? As Director of the Company?]

No, as Golap Lal Ghose. Suppose I have been served with notice as Director. The fact they served a notice upon me as Director does not prove that I am he. Those are technical points no doubt but I submit I am entitled to take them. Your Lordships are exercising very extraordinary jurisdiction and if I can take any technical point I am entitled to take it on behalf of my client.

[MOOKERJEE, J.—If section 90 applies?]

Then it would be different. I am very much obliged to your Lordship. That strengthens my argument. If a document is 30 years old and is produced from proper custody then the Court may take it that the signature of the person which it purports to contain is the signature of that person. Then there are various provisions in the Companies Act itself which show that certain documents may be taken as *prima facie* evidence of their contents but in this case there is no such provision. If your Lordships accept this as secondary evidence of proof of the original then there is no proof of the signature and unless there is such proof I cannot be convicted of this offence. Secondly, it shows that on the 5th March 1917,—I am assuming your Lordships are against me on the other points—I was a Director and Financial Manager. In a criminal trial you cannot draw an inference from that that because I was Financial Manager or a Director on the 5th March 1917, therefore on the date on which these paragraphs appeared in the “Amrita Bazar Patrika,” I still held that office. Suppose I was prosecuted for criminal breach of trust as a servant and the prosecution proves that three months before the occurrence I was their servant. I submit no conviction could rest on that evidence. The prosecution must in that case carry further and say that on the date of the offence I held that office.

[MOOKERJEE, J.—It can be proved by oral evidence that no change had been notified under section 87.]

That may be. Such returns have got to be made from time to time. If there is a question of presumption your Lordships may draw the inference that these returns were made and if they were made they should be produced. Then your Lordships would have had before you all the documents which would have shown or might have shown that the accused was in that position on

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the dates on which those paragraphs appeared. That, however, is wanting. Matters which have to be proved by evidence cannot be made the subject of inferences which must be under those circumstances conjectures. There is nothing in the law to prevent my giving up that appointment the very next day. Before your Lordships can convict me there must be evidence before you that on the dates on which these paragraphs were written or published I was a Director or Financial Manager.

The next point I desire to discuss in this connection is that suppose you take it I was a Director and the Financial Manager on the date when those paragraphs appeared. I am assuming that against me. What does it prove? I take the case of my being the Financial Manager first. The evidence upon which I have been asked to show cause indicates my duties are in the financial line and therefore so far as that is any indication it shows that I have nothing to do with the editing of the paper or the editing of the paragraphs or any work with reference to the publication of those paragraphs. I submit, therefore, that is in my favour.

Then the question is of Director. In the way in which that return is made I ask your Lordships to consider whether it is not a fact that out of the Directors some are appointed Managers and of the Directors I am appointed Financial Manager. Different duties are cast on different Directors. Your Lordships cannot suppose that in a meeting of the Directors it was discussed that those paragraphs showing contempt of the High Court should be published in the paper. My liability must entirely depend upon how far I was engaged in the work of publishing this paper. That must be alleged. Where is there such an allegation against me except that I am a Director and a Financial Manager? There is no reason to suppose in the face of that certificate that Directors—specially those holding such a post as Manager or Financial Manager—have anything to do with the editing of articles or the publication of the paper. A reasonable way of reading that document is this, there are so many Directors, that so far as the executive work is concerned with regard to the publication of the paper it has two sides, namely, the editorial side and the financial side. The financial side is not concerned with the editing and publishing of the paper. It is alleged against me that apart from being a Director who has got a right to attend Directors' meetings and deliberate and discuss matters placed before the Directors there, I am entrusted with the work of financial management. Those are the allegations made against me and those are the allegations I have come to meet. I am showing

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your Lordships that I have nothing to meet. The case for the prosecution if I may use that expression—is that I am a Director who attends meetings of the Directors and over and above that I am the Financial Manager. Therefore in the face of those allegations I venture to submit that your Lordships cannot draw any inference or conclusion—or even a reasonable conjecture does not arise—that I have anything to do with the publication of the paper. Therefore from that point of view there is no evidence against me. Then I go further than that. As a Director there are sections in the Indian Companies Act which provide for the Memorandum of Association being sent to the Registrar's Office as well as the Articles of Association. The duties of Directors so far as the Company is concerned are duties which are defined and circumscribed by the Articles of Association. Why is it that a copy of the Memorandum is before your Lordships and not the Articles of Association?

[SANDERSON, C. J.—We have the Articles of Association.]

It is not part of the affidavit.

[SANDERSON, C. J.—No. It has been put in by one of the respondents. It was read on Tuesday. It is attached to the affidavit of Mrinal]

I have not put that in and I know nothing about it. I don't know whether that is for me or against me. I put my case on a different footing. There is abundant authority for the proposition that directly the name of the Director of a company is announced it would not do to say that a Director is he who directs or that a Director is he who manages.

[SANDERSON, C. J.—Suppose the Articles say that the Directors are to manage the business and that the business is that of publishing and printing. Is it not *prima facie* that they do publish and print?]

That would depend on whether the only business indicated in the Articles is the conduct of the paper.

[SANDERSON, C. J.—Leave out the word “only.” If a Company is formed the main object of which is to carry on the paper, and the Articles say the Directors are to manage and publish the paper, I would assume *prima facie* they were managing.]

With regard to every Director?

[SANDERSON, C. J.—I assume that would be their duties.]

Their duty under the Articles was, they were to hold meetings of the Directors in which the question of finance, appointment

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of Editor and so on was to be discussed and the Article went further and said Director so and so was to be responsible for finance.

[SANDERSON, C. J.—Of course that would make a difference. Suppose it says, as it says here, the business of the Company shall be managed by the Directors who shall pay all expenses and so on.]

I cannot submit my case on documents which are not part of the evidence against me at present. Apart from the question of this man being a Director, it raises the legitimate proposition that his duties are regulated by the Articles of Association. The Articles of Association are not pleaded against me. It was not one of the grounds on which this rule was issued.

Counsel then cited the case of *Imperial Hydropathic Hotel Co. v. Hampson* (1) and said that there the matter was discussed as to what were the duties of a Director and his rights and liabilities. He submitted that in this case their Lordships could not arrive at any such conclusion that because this man was a Director he must know this, that because he was a manager he must know this. For a criminal trial something more definite was necessary that it was his duty to look after the printing or the publishing of the paper in question. After all if their Lordships took it as a matter of legitimate inference they must take it in connection with the usual way in which business was done under these circumstances. If there was a Company for the purpose of publishing a newspaper and other things as well, as the Memorandum showed, what would their Lordships expect? Their Lordships would expect in the usual course that the Company would appoint an Editor for the purpose of editing the paper and that it should be in the discretion of the Editor as to the manner in which he edited the paper. They might reasonably infer that probably the general policy of the paper was indicated to the Editor. After all the question as to which particular articles should or should not be published must be left to the discretion of the Editor. Therefore *prima facie* a man who was a Director and nothing more than a Director would not look to the printing or publishing of different paragraphs which came in the different issues of the paper. Of course if their Lordships had evidence before them that a particular Director was also entrusted with the duty of looking after the newspaper and doing the work of Editor, then the matter would have stood on a different footing. Their Lordships had not got that evidence. The only evidence they had was that he was a Director. They could not draw the inference from that that because he was a Director he must be taken to be

(1) (1882) L. R. 23 Ch. D. 1.

aware of what articles were published and therefore he must have known before the publication of those articles that they were of this character and therefore he was liable for a criminal offence. Mr. Das submitted that that conclusion was too remote having regard to the facts which their Lordships had before them.

Then with regard to the matter of these Directors and Managers their Lordships had had the case of *Ex parte Green* (1) put before them, from which they would see that in that case the argument was not because he was Manager he was responsible. In that case the Judges had carefully gone into all the circumstances, the previous correspondence and the admission of the Manager and it was upon the admission of the Manager and the contrast between those letters and correspondence and his affidavit filed in Court at the time of the trial that the Judges came to the conclusion that he was responsible. Here their Lordships must have evidence before them to show that this man was responsible for the publication.

Counsel next cited *O'shea. v. O'shea* (2) and said it very often happened that even with regard to a paper the Editor was responsible for the editorials while the advertisement department was left in somebody else's charge. It would be impossible to manage the publication of a paper unless there was division of labour like that. Their Lordships were not considering the question of civil liability but the question of criminal liability. The mere fact that those people were Directors or Managers or Financial Managers would not justify their Lordships in coming to the conclusion that they were responsible.

[WOODROFFE, J.—What is the difference between civil and criminal liability? Ordinarily we regard as a civil liability that which results in damages and so forth. A decree is awarded to give reparation to a plaintiff. A criminal liability is that in which the Court puts proceedings in motion for the purpose of punishing a person who does something wrong. If you take this question of civil contempt and criminal contempt you find in both cases the Court awards punishment whether it is civil contempt or criminal contempt.]

Even in civil contempt those proceedings have been described by decisions to be decisions "in *panam*."

[WOODROFFE, J.—They don't come under the ordinary civil and criminal proceedings. Whether you call it civil or criminal they result in punishment. Therefore it is nothing more than this that the law has attached certain epithets to certain classes of con-

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(1) (1891) 7 T. L. R. 411.

(2) (1890) 15 P. D. 59.

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tempt and they call one class contempt of a criminal nature and the other class contempt of a civil nature.]

It is only for the purpose of deciding the question of jurisdiction but so far as the offence is concerned it is in both cases criminal. It is a proceeding "in *pœnam*."

[WOODROFFE, J.—Then what do you say about jurisdiction ? ]

The one is criminal jurisdiction, the other is civil jurisdiction. I am addressing your Lordships from the point of view that it is a proceeding "in *pœnam*" and therefore you must look at the evidence strictly.

[WOODROFFE, J.—All evidence must be looked at strictly.]

[MOOKERJEE, J.—Strict proof is required in criminal cases. Equally strict proof is required in civil cases.]

That is so. I am pleading for the application of strict proof. If your Lordships apply strict proof I have nothing to complain of.

Counsel next cited Statutes 6 and 7 Victoria the case of *Harding v. Greening* (1) and the case of *Regina v. Holbrook* (2)

[SANDERSON, C. J.—The procedure for civil contempt and criminal contempt is the same ? ]

Yes It is a proceeding "in *pœnam* "

WOODROFFE, J.—Does it not come to this that both the jurisdiction to commit for contempt and the contempt itself are "*sui generis* ?"]

Yes. The point of view from which I am addressing your Lordships is that it is a proceeding "in *pœnam*" Therefore according to your Lordships' ruling in the case of *Legal Remembrancer v. Mati Lal Ghosh* (3) the proceedings ought to conform as nearly as possible to the proceedings in criminal cases.

*Mr. Das* continuing said that the last two cases showed that whether or not the Common Law of England at one time was that the proprietor could be punished even although it was proved that he was not responsible for the particular libellous matter ; it certainly was not the law of England now by reason of 6 and 7 Victoria Be that as it may, there could not be any doubt that it was not the law in India at present and it was impossible to argue that that law applied in this country to convict people who were not directly responsible for the publication of the libel He referred to Section 499 of the Penal Code and also to Section 591. He had

(1) (1817) 8 Taunt 42.

(2) (1877) 13 Cox. Cr Cas 650 ; (1878) 14 Cox Cr Cas 185.

(3) (1913) 18 C. L. J. 452.

been described as a Director and Financial Manager. It did not follow from that he was personally responsible for the publication. That responsibility must be fixed upon him by some evidence direct or indirect. The only evidence there was here was the statement referred to and that did not establish his responsibility. He next submitted that there was no necessary connection between the two articles of 18th May and 22nd May. In the first place there was no reasonable ground upon which that could be assumed. Then there was nothing to suggest that they were not written by two different persons on two different dates unless their Lordships by way of inference read into these two matters something which was not there. In the first article the writer did not believe that any official of the Trust would dare go so far as to approach the Chief Justice or any Judge of this Court. In the next article he said that consternation prevailed but it was not a fair reading of it to assume that the official did approach the Chief Justice. There were words put in as a sort of protection:

[SAANDERSON, C. J.—Which words ? ]

That there was a mischievous rumour which should be contradicted. He also said that “we are sure that every rate-payer is safe in the hands of the Hon’able Judges. We are sure that the officials of the Trust will not go so far.” He did not intend that the contradiction should come from the Judges of the High Court. He himself contradicted.

[SANDERSON, C. J.—If his object was not to draw attention to the rumour, why publish it ?]

*Mr. Das* said he would deal with this point later on. Supposing there were two views possible, the Court was bound to see which was consistent with the writer’s innocence. If once they started with the idea that the writer was innocent then everything pointed to these paragraphs should be read absolutely in favour of their innocence. Why should their Lordships put something else into the articles which was not there and draw adverse inferences. The facts according to the rumour were that Mr. Justice Mookerjee and Mr. Justice Cuming who had decided *Chandra Kant’s case* (1) against the Trust were withdrawn and the Bench was altered and was constituted by the Chief Justice and Mr. Justice Woodroffe coming in and Mr. Justice Chitty was to join their Lordships. Upon that the writer said why should that be so? Are not the Chief Justice and Mr. Justice Woodroffe quite competent to try the case? As regards their reason

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(1) (1916) 24 C. L. J. 246.



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for suggesting the addition of two Indian Judges, Mr. Das, desired to dissociate himself from the arguments put forward by Mr. Jackson who suggested that the writer wanted two Indian Judges because the Indian Judges were interested as land-owners and were affected by the Improvement Trust. That would be the strongest ground for suggesting that Indian Judges should not be on the new Bench.

[SANDERSON, C. J.—Is not this a sort of suggestion that the Indian Judges would themselves resent very strongly?]

I should submit so myself.

Continuing he said that the writer was considering the mysterious rumour in the public mind which was strengthened by the unfortunate fact that just after the decision of *Chandra Kant's case* (1) Justices Mookerjee and Cuming were removed.

[SANDERSON C. J.—It is only the withdrawal of Sir Asutosh that is mentioned.]

Before that the writer says that the Judges who decided the case were Justices Mookerjee and Cuming. Therefore it did not mean the withdrawal of Sir Asutosh alone but the withdrawal of the Bench. The writer was not drafting a plaint or a written statement. The writer is debating the matter with himself. He is putting forward different reasons and is disposing of them one by one. It might be impertinent for him to advise the Chief Justice as to the way in which he should form his Benches but it is not contempt of Court.

[WOODROFFE J.—If it only means what you said, why would he say if you are going to have more than two judges have a Full Bench and have Indian judges, and why does he say that unless you do what they tell you to do, that would leave an unsavoury impression.]

He says that the rumour is strengthened by these facts. He is putting forward the public view which might be unjust and mischievous but at any rate he is expressing the public view, and he says that the unsavoury impression will be removed because it follows close upon the heels of *Chandra Kant's case* (1).

[FLETCHER J.—That means that there is some hidden meaning for importing Mr. Justice Chitty on to the Bench.]

That is not the reason. It is to allay the suspicion of the public that a Full Bench is suggested with two Indian Judges. Why should you suppose that there is any hidden attack on Mr. Justice Chitty. It was not only the withdrawal of the Bench which decided against the Trust but close upon it came the formation of a new Bench. He says that this rumour was strengthened in the mind of the public by

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these events, first by the withdrawal of Justices Mookerjee and Cuming who decided the case against the Trust, and secondly that the new Bench was to be strengthened by bringing in Mr. Justice Chitty. Then the writer suggests that these facts would leave a mischievous impression on the mind of the public and the suggestion which the writer makes is this: he says we have perfect faith in the Chief Justice, still to allay public feeling a Full Bench should be formed with two Indian Judges.

[WOODROFFE J.—Supposing the suggestion is exactly what the writer says, namely, that it has given the unsavoury impression that Sir Asutosh Mookerjee was withdrawn because he had decided against the Trust.]

Not only the withdrawal but the withdrawal following close upon the decision.

[WOODROFFE J.—Yes, because he had given judgment against the Trust. It was supposed that my learned brother would try the other cases and he was withdrawn because he had given his judgment against the Trust.]

That is the meaning. He says that this was the rumour.

[SANDERSON, C. J.—Do I understand you to say that this was the clear meaning of the article that Sir Asutosh Mookerjee had been withdrawn because he had given judgment against the Improvement Trust.]

I beg pardon what I said is that the two events were following each other closely. He is not giving them as his own grounds. He is speaking of the unfortunate chain of events.

[SANDERSON, C. J.—I thought my learned brother had put the question and your answer was that this was a clear meaning of the article.]

If this was so I did not hear Mr. Justice Woodroffe properly. I do not say that the writer suggests that Mr. Justice Mookerjee was withdrawn because he had decided against the Trust.

[WOODROFFE, J.—I put it to you that one of the suggestions made in this article was that the Trust were moving in this matter because Mr. Justice Mookerjee had given his decision against them, and the writer was under the impression that all the cases dealing with the Improvement Trust were to be heard and disposed of by Justices Mookerjee and Cuming and that in order to aid these manoeuvres of the Trust my learned brother had been withdrawn, and you said that this was clearly the meaning.]

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If I said so I did not mean that the writer meant this. He refers to the chain of events and he speaks of the apprehension in the mind of the public.

[SANDERSON, C. J.—Do I undersand you to say that the meaning was that Sir Asutosh had been withdrawn on account of his judgment against the Trust.]

Not only that but the whole chain of events. It is not the isolated fact but all the things taken together which had caused the impression. The writer does not say that this is well-founded, but he is giving some sort of excuse for the public feeling.

Counsel then went on to explain the meaning of the second article and submitted that there was nothing in it which showed that there was any contempt.

[SANDERSON, C. J.—Who does he suggest as being responsible for the withdrawal of Sir Asutosh.]

He does not suggest that. He says that the public have taken it in that way because of the chain of events. He speaks of his perfect faith in your Lordship. How then could it be contempt of your Lordship? That expression in itself contradicts that idea and is inconsistent with it. He was not saying anything which is insulting or contemptuous. Your Lordship put it to me a little while ago that if it was a mischievous rumour why did he express it. If it was with reference to a private person of course he should not have expressed it but in this case it might be a source of incalculable mischief, and if it went uncontradicted it might gather strength and result in universal belief that the High Court is no longer to be trusted. That would be a state of affairs which would be a thousand times more mischievous than giving expression to the rumour and trying to combat it.

Counsel went on to say that their Lordships should start with the idea that the writer did not write this article with any intention to insult or annoy or give any offence. What was the good of holding this trial if they started with the idea that there was no such rumour and that the writer's sole object was to attack the High Court, and that he could not do it on facts, he tried to do it on invented facts. In this case their Lordships were both prosecutors and judges at the same time and they should not start with an idea like this. They must start with the idea that the man was an innocent man. It was only when they found that they could not accept this view that they must take the other view. This was the basic principle of British justice. Where was the contempt in saying that two Indian Judges should be associated with the Bench unless it was assumed

that the mischievous facts were purposely put in that way. The sentence referring to the withdrawal of Mr. Justice Mookerjee giving rise to an unsavoury impression should not be taken by itself. It must be taken in connection with the rumour that the Improvement Trust were taking some steps, that Justices Mookerjee and Cuming had decided the case against the Trust, that following upon it was the so-called withdrawal and it did not rest there. Then he referred to the constitution of a new Bench, comprising of the Chief Justice and Mr. Justice Woodroffe and the appointment of Mr. Justice Chitty to this Bench. All these facts together had given rise to the impression in the public mind and yet he said that he had perfect faith in the Chief Justice. He submitted that there was nothing which showed any intention of any contempt of Court. There was no circumstance from which their Lordships could gather clearly that the writer had any intention to commit contempt of Court. Unless they came to that conclusion they could not convict. They must convict on a clear case and not upon suspicions or conjectures. It might be impertinent but there was nothing improper in suggesting how a Bench should be formed. The suggestion that the Bench should consist of three European and two Indian Judges could not be called contempt of Court. A suggestion like that might be impertinent, but it was not necessarily improper and was not contempt of Court. From it they could not draw any inference adverse to the accused.

In conclusion Mr. Das submitted that even if their Lordships came to the conclusion that it was contempt it must according to his argument be a very technical contempt. He then drew attention to a number of cases on this point and following Mr. Chakravarti's argument submitted that there was no tendency in this case to obstruct the course of justice.

C. A. V.

**Sanderson C. J.**—In this matter the Rule was issued by me as Chief Justice of this Court after consultation with the learned Judges in consequence of two articles which appeared in the "*Amrita Bazar Patrika*" newspaper on the 18th and 22nd of May, 1917, respectively. The Rule was directed to Tarit Kanti Biswas, the printer and publisher of the newspaper, and to Mati Lal Ghose, Golap Lal Ghose and Pijush Kanti Ghose, Directors, and Golap Lal Ghose and Mrinal Kanti Ghose, the Managers of the Company called the "*Amrita Bazar Patrika Ltd.*" having its registered office at No. 2 Anando Chatterjee's Lane, Calcutta, and the Rule called upon them to show cause why they should not be committed or otherwise dealt with

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according to law for contempt of Court alleged to have been committed by them by unlawfully publishing the two articles concerning the High Court and the Chief Justice in his administration thereof.

The respondents to the Rule have all appeared by learned counsel.

The first question which it is necessary to consider is whether these articles or either of them, constitute a contempt of Court. The appeals from Mr. Justice Greaves to which both the articles refer are the appeals in the three cases mentioned at the head of the Rule. These cases were decided by Greaves J., sitting on the Original Side, and the appeals in which the Improvement Trust were respondents were about to be heard by the Court hearing appeals from Original Side at the time of the publication of the two articles in May 1917.

The first article is as follows:—"There is a mischievous rumour afloat which should be contradicted. It is stated that a vigorous attempt is being made to get up a Bench to consider the appeal on the judgment of Mr. Justice Greaves in connection with the acquisition of surplus land by the Calcutta Improvement Trust according to somebody's choice. We do not believe that it is possible for any one, far less the Chairman of the Trust, to secure a Bench after his own heart as a counter-poise to the Mookerjee and Cuming Bench. We are sure the interest of every ratepayer is safe in the hands of the Hon'ble Judges, and we do not think that any official of the Trust can go so far."

The reference to the "Mookerjee and Cuming Bench" is to an appeal which was disposed of by Mookerjee J., and Mr. Cuming when he was temporarily acting as a Judge of the High Court in August 1916, when the decision was against the Improvement Trust.

The second article is as follows:—"Something like consternation prevails on account of the proposed new constitution of the appellate Bench of the Calcutta High Court before which appeals against the awards of the Improvement Trust are to be heard. It is known to the reader how this Bench was originally composed of Sir Asutosh Mookerjee and the Hon. Mr. Justice Cuming, and how latterly it has come to be presided over by the Hon. the Chief Justice and Mr. Justice Woodroffe. Rumour has it that for purposes of hearing Improvement Trust Appeals the Bench is going to be strengthened by the appointment of Mr. Justice Chitty. Now what neither the public nor ourselves can understand is this special arrangement for such a special Bench. If it is contended that two Hon'ble Judges of the highest Court in the land are not competent to decide in appeal cases in which the Improvement Trust is

concerned, a contention, however, which we do not believe the Chief Justice will care to advance, why should there be a special Bench of three and not a Full Bench of five, on which at least two Indian Judges could find seats? As a matter of fact, as land-owners in Calcutta are mostly Indians and as Indian Judges are likely to know more of conditions, practices, etc., prevailing here, it is but meet that the Appellate Bench in the present circumstances should be so composed as to associate Indian Judges with their European colleagues. The withdrawal of Sir Asutosh has given rise to rather unsavoury impressions in the public mind, since this proposed arrangement is to follow close upon the heels of his judgment in the case of *The Improvement Trust v. Chandra Kanta Ghosh* (1). Be that as it may, we have perfect faith in the present Chief Justice and believe that as soon as Sir Lancelot Sanderson understands the public feeling in the matter, his Lordship will either form a Full Bench or at least associate an experienced Indian Judge with himself for the hearing of the Improvement Trust appeals."

It was admitted by the learned Counsel for the respondents at the hearing of the Rule that the statements of facts contained in this article were in many material respects untrue. There was not an appellate Bench constituted to hear appeals "against the awards of the Improvement Trust" as the article assumes. Such Bench was not originally composed of Sir A. Mookerjee and Mr. Justice Cuming as stated in the article: such Bench had not latterly come to be presided over by the Chief Justice and Woodroffe, J. and it is untrue that Sir A. Mookerjee had been withdrawn from the Court.

Though these admissions have been made, it may be advisable to state the real facts.

In August, 1916, as already stated Mookerjee, J. and Mr. Cuming were sitting as a Division Bench on the appellate side and an appeal by the Improvement Trust from the Sub-Judge of the 24-Perganas having come before them in the ordinary course, was disposed of by them. One of the questions was the alleged power of the Improvement Trust to acquire land compulsorily for the purpose of recoupment and the decision was against the Improvement Trust.

In July, 1916, Greaves, J. sitting on the Original Side, had decided the same question in three cases in favour of the Improvement Trust, and in May of this year the appeals from Greaves, J.'s judgment in the three cases were about to be heard by Woodroffe, J. and myself, the Judges who were then taking the appeals from the

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Original Side. Under these circumstances the articles were published.

As regards the inclusion of Chitty, J. in the Court, no explanation is necessary: it would be sufficient for me to state that I, as Chief Justice, thought it desirable to have three Judges to hear the appeal. But the reason in this case must have been obvious to every one. It was within my knowledge as it was within everyone's knowledge, that Mookerjee, J., had decided one way and Greaves, J., had decided another way on the construction of the Act on which the cases depended. It was obviously, therefore, a matter on which difference of opinion was possible; moreover it was a case of general importance and in order to avoid a further disagreement which might occur if the Court was constituted of two Judges only, and to avoid the further proceedings and delay which would undoubtedly be consequent on such a disagreement, I thought it advisable to have three Judges instead of two, and accordingly I requested Chitty, J., the next Judge in order of seniority, who had not already had the matter before him, to sit with Woodroffe, J., and myself, and hear the appeals. I may mention here that in my opinion all appeals from a Judge sitting on the Original Side, except interlocutory appeals, should be heard by a Court constituted by three Judges, and when I first sat in this Court it was so constituted; but I found that the allocation of three Judges to that Court, dislocated the work in other departments of the Court so much, that I came to the conclusion with much reluctance that with our present staff of Judges I could not allocate more than two Judges to the Original Side appeals, except in special cases.

These being the facts, I now proceed to consider whether the articles are a contempt of Court.

I take the definition given by Lord Russell of Killowen in *R. v. Grey* (1).

"Any act done or writing published calculated to bring a Court or a Judge of the Court into contempt, or to lower his authority, is a contempt of Court. That is one class of contempt. Further, any act done or writing published calculated to obstruct or interfere with the due course of justice, or the lawful process of the Courts, is contempt of Court. The former class belongs to the category which Lord Hardwicke L. C. characterised as "scandalising a Court or a Judge." That description of that class of contempt is to be taken subject to one and an important qualification. Judges and Courts are alike open to criticism, and if reasonable argument or expostulation

(1) (1900) 2 Q. B. 36 (40).

is offered against any judicial act as contrary to law or the public good, no Court could or would treat that as contempt of Court. The law ought not to be astute in such cases to criticise adversely what under such circumstances and with such an object is published ; but it is to be remembered that in this matter the liberty of the press is no greater and no less than the liberty of every subject of the Queen."

With regard to the first article I have no doubt it constitutes a contempt of Court. It was admitted by the learned Counsel appearing for the Printer and Publisher that it was a gross libel upon the Improvement Trust, one of the litigants. It alleges that it is stated that a vigorous attempt is being made to get up a Bench to consider the appeal on the judgment of Greaves J., in connection with the acquisition of surplus land by the Calcutta Improvement Trust according to somebody's choice, which Bench is referred to therein after "as a counterpoise to the Mookerjee and Cuming Bench," which as I have stated, had decided against the Improvement Trust. It was urged that this should not be regarded as a contempt, because the matter which would be argued on the appeals was the construction of an Act, and would be decided by Judges who would not be affected by such remarks.

The question is not whether the article in fact obstructed or interfered with the due course of justice, but whether it is "calculated" to obstruct and interfere with the due course of justice. No matter what the tribunal may be, I am at a loss to understand how it can be seriously argued that such a grave allegation against one of the litigants that he was attempting to get a Bench constituted in such a way as would in his opinion give him a favourable decision, is not calculated to obstruct or interfere with the course of justice. Further, the mere suggestion that such a thing is within the bounds of possibility is a grave reflection upon the Court and the persons responsible for its administration. I am not unmindful of the argument that the article refers to a "mischievous rumour which should be contradicted" and that confidence is alleged in the Hon'ble Judges. The fact that the article is based on a rumour, even if it existed, cannot, in my judgment, excuse the publication of it. It must have been known to the person responsible for the publication that it was absolutely impossible for a litigant to get a Bench constituted according to his own choice. It is, however, a well-known method of spreading a libel for the publisher who does not wish to take responsibility for it, to say there is a rumour to this or that effect, but that he himself does not believe it. It was admitted by one

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of the learned Counsel for the Respondents that some words may have been inserted in the article by the person responsible therefor in order to protect himself in case of emergency, and having regard to the whole tenor of the article, I have very little doubt that this was the object of the writer in concluding in the manner referred to. If the matter had stopped there, although the paragraph was reprehensible and a clear contempt of Court, it might not have been necessary for the Court to take any steps of its own motion.

The second article, however, appeared four days later on the 22nd May. As already mentioned the facts therein stated are admittedly untrue; and consequently the insinuations based thereon are equally groundless. The only part of the article which is based on an alleged rumour is that Chitty J., was to be appointed to the Bench, which was to hear the Improvement Trust Appeals. For the rest of the statements in the article the author makes himself responsible.

The statement that "something like consternation prevails on account of the proposed new constitution of the Appellate Bench" taken by itself is a grave allegation. Why should a Bench which is to be composed of the Chief Justice and two of the most experienced Judges of the Court cause consternation? But when it is taken with what follows it assumes a much more serious complexion. After misstating the facts as to the previous constitution of the Bench and referring to the proposed inclusion of Chitty J., it proceeds "now what neither the public nor ourselves can understand is this special reason for such a Special Bench." It then proceeds to argue that the proper thing would have been to have a Full Bench on which at least two Indian Judges could have seats. Reading so far, there may be some reason for doubt as to the meaning of the article, though the above allegations go the length of alleging that for some reason which no one could understand the Chief Justice was about to include Chitty J., in the Bench, and that such constitution of the Bench had caused something like consternation. But I think all doubt is set at rest by what follows when the author makes himself responsible for the statement that Mookerjee, J., has been withdrawn from the Bench and that such withdrawal "has given rise to rather unsavoury impressions in the public mind since this proposed arrangement is to follow close upon the heels of his judgment in the case of *The Calcutta Improvement Trust v. Chandra Kanta Ghosh* (1)." Reading that in the ordinary way, can it mean anything except that Mookerjee, J. has been withdrawn from the Bench, taking the appeals

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• against the awards of the Improvement Trust: that such Bench was originally composed of Mookerjee, J., and Cuming, J., that it is now composed of the Chief Justice and Woodroffe, J., that Chitty, J., is about to be included which is a special arrangement which neither the author of the article nor the public can understand, that if any special arrangement is necessary why should not Indian Judges be included and that the withdrawal of Mookerjee, J., coming as it does so soon after his judgment against the Improvement Trust, has caused an unsavoury impression in the public mind. Consequently something like consternation prevails at the proposed new constitution of the Bench.

I think it is clear that it means that Mookerjee, J., has been withdrawn from the Bench taking the appeals against the award of the Improvement Trust and insinuates that it is because of his judgment against the Trust and therefore an unsavoury impression has arisen. I fail to see any other meaning which can be attributed to it and I have no doubt that this article, read by itself, constitutes a very serious reflection upon the administration of the Court, which everyone knows is in the hands of the Chief Justice. But if it is read in conjunction with the previous article, the abovementioned meaning is made plain beyond dispute. I think the articles should be read together. They were published with only four days interval, they refer to the same subject-matter, they are written in the same strain and in the same style, and each article appeared in the columns of the Newspaper which are devoted to leading articles. When read together what do they mean? It is obvious to my mind they mean to suggest that a vigorous attempt had been made by the Improvement Trust to secure a Bench composed according to their choice and that the attempt has succeeded; that otherwise the proposed constitution of the Bench is inexplicable and something like consternation prevails. If this be the correct meaning, there is no doubt that it is calculated to bring the Court and the Chief Justice who is responsible for its administration, into contempt it is calculated not only to destroy confidence in the tribunal but also to undermine and impair the authority of the Court. If so, there is no doubt that it is a contempt of this Court.

There are two other matters to which I wish to refer. It was argued that the object of the second article was to procure the appointment of two Indian Judges or one Indian Judge to the Bench which was to hear the appeals and the suggestion contained in the article was that as the land-owners in Calcutta were mostly Indians, and Indian Judges are likely to know more of conditions and practice

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prevailing, that it was but meet that Indian Judges should be associated with their European colleagues. The question at issue in the appeals depended on the construction of the sections of a certain Act, and had nothing to do with the conditions and practices, etc., relating to Indians. This however might be put down to ignorance on the part of the author of the article, though from the references made in the article to such matters as the constitution of the Courts, Full Bench and other matters, the writer appears to be fairly familiar with the proceedings of the Court and the nature of the appeals in question. A further argument, however, was adduced by the learned counsel for Moti Lal Ghose, viz., that the real object of the article was to get an Indian Judge, who possessed land, appointed to the Bench in question, because Indian Judges would approach the subject from a totally different point of view from that of European Judges, who do not possess land and who do not know where the shoe pinches. This to my mind was an astonishing argument. I was not surprised therefore when Mr. C. R. Das appearing for another of the respondents at a later stage of the hearing disassociated himself from that argument and stated that in his opinion the abovementioned argument would be the strongest ground for suggesting that Indian Judges should not be on the Bench in question. Assuming however that the learned counsel for Moti Lal Ghose was correct in his statement as to the meaning and object of the article, it is not only one which would be rightly and strongly resented by my Indian colleagues but it also provides an additional reason for holding the article a contempt of Court: for it involves the suggestion that one of my Indian colleagues should be added to the Bench in question because he possessed land and would approach the question from a different point of view from a Judge, who possessed no land and who would therefore be entirely independent and it thereby constitutes a very grave and unjustifiable reflection on my Indian colleagues.

It is also to be noted that if this was the object, the author of the articles was endeavouring to obtain the constitution of a Bench after his own heart, the very thing which he had professed to condemn so strongly when attempted, as alleged, by the Improvement Trust. Assuming, however, that the object of the article was to get an Indian Judge appointed, no matter for what reason, that does not justify the publication of the untrue statements of facts and the unworthy and groundless insinuations based thereon.

The other matter to which I refer is the passage at the end of the article in which the author expresses perfect faith in the Chief Justice. This, to my mind, is so inconsistent with the insinuations

- previously made in the articles, that it is impossible to conceive that it was genuinely intended. It is much in the same style as the conclusion of the previous article, and I do not think there can be any doubt as to the object of the author in using these words, viz., to try and provide a means of escape for himself if he is taken to task for the previous matter contained in his article.

No one has come forward to acknowledge the authorship of the articles or the responsibility of the publication, and we have therefore had no opportunity of hearing or considering any explanation from the individual, in person, who was so responsible. Consequently the meaning and the intention of the writer must be gathered from the articles themselves. They must be read as they stand giving to the words used their natural meaning. We have had many arguments and many commentaries upon the articles addressed to us by all the learned counsel on behalf of the respondents. I have considered them carefully and though I should like to have come to the conclusion that the articles do not and were not intended to constitute an attack on the Court, I regret to say I am unable to come to that conclusion. It might possibly have been different if the author of the article or the person responsible for its publication had come forward and personally explained what was in his mind ; but he has not chosen so to do, and we must construe the articles as they stand, and I have no doubt that anyone reading them would come to the conclusion that a very serious aspersion was cast upon the Court and the administration thereof, and that consequently they do constitute a contempt.

If then the articles constitute a contempt the next question is, whether the Court has jurisdiction to deal with it by these proceedings. There can be no doubt as to this : it was held in 1883 in *S. N. Bannerjee v. The Chief Justice of the High Court at Fort William in Bengal* (1) by the Judicial Committee that the High Courts in the Indian Presidencies are Superior Courts of Record. The offence of contempt of Court and the powers of the High Court to punish it are the same in such Courts as in the Superior Courts in England, and the jurisdiction was exercised by the High Court in that case.

This jurisdiction was affirmed in 1913 in the case of *Legal Remembrancer v. Mati Lal Ghose* (2) when Sir Lawrence Jenkins, C. J., said at page 216 : "Now this Court is a Court of Record in all its

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(1) (1883) I. L. R. 10 Calc. 109 ; I. L. R. 10 I. A. 171.

(2) (1913) I. L. R. 41 Calc. 175 ; 18 C. L. J. 452.

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jurisdictions and it thus has power to commit for any contempt in relation to any of those jurisdictions."

Then Mookerjee, J., at page 242 said "Now it is indisputable that a Court of Record has authority to punish for contempt. Sir Barnes Peacock, C. J., observed in *In re Abdul and Mahtab* (1) that this Court by the express terms of the Letters Patent is a Court of Record and there can be no doubt that any Court of Record has the power of summarily punishing for contempt" and indeed the learned counsel appearing for the Printer and Publisher of the newspaper admitted the jurisdiction of the Court but argued that in this case it should not be exercised. The suggestion that this jurisdiction is obsolete and ought not to be exercised is futile, in view of the fact that it was exercised by this Court in 1883 and affirmed to be in existence in 1913. It was also exercised in England as recently as 1900 in the case of *R. v. Grey*, (2) already referred to.

The question remains then whether the Rule should be made absolute against the respondents or any of them.

As regards the case of Tarit Kanti Biswas, the first respondent on the record, there is evidence that he was the Printer and Publisher of the Newspaper. We have before us a certified copy of the return made by him under the Act (XXV of 1867), his name appears in the Newspaper as Printer and Publisher and he has himself put in an affidavit admitting that he occupies such position and that he printed and published the articles in question.

As already stated his learned counsel admitted the jurisdiction of this Court and further admitted his legal responsibility if the articles constituted a contempt. This responsibility could not be denied, for it has been held in many cases that the Printer and Publisher is liable for contempt even though he was not aware of the subject constituting such contempt and the reason for that is given by Lord Morris in *McLeod v. St. Aubyn* (3) as follows:—"A Printer and Publisher intends to publish and so intending cannot plead as a justification that he did not know the contents." Again it was pointed out by Stirling J., in *The American Exchange in Europe* (4) that the Foreman Printer (who was the person concerned in that case) is the person who is held out to the public as the Publisher, and under these circumstances he is answerable for publishing the article complained of, although he is ignorant of its contents. This has been

(1) (1867) 8 W. R. Cr. 32.

(3) (1899) A. C. (549) 562.

(2) (1910) 2 Q. B. 36 (40).

(4) (1889) 58 L. J. Ch. 706 (707).

the law since the well-known decision of Lord Hardwicke in the case of *St. James Evening Post* (1).

I refer to the above-mentioned cases to show that in my judgment the learned counsel was correct in making the admission that the Court has jurisdiction in these proceedings, and that if the articles constitute a contempt of Court, the Printer and Publisher is legally liable in respect thereof.

Having held that the articles are a contempt, it remains to be considered whether the Rule should be made absolute. The printer and publisher has put in an affidavit in which he alleges he did not read the articles when they were handed to him for publication, which was done in the ordinary course of his business. He admits that certain statements in the second article are incorrect, and he then proceeds to argue that the publication was in the public interest. Para 6 of his affidavit runs thus :

"That I further state that the said articles were published by myself in good faith and in the public interest and without any intention whatsoever of offending against the dignity or integrity of this Hon'ble Court or of prejudicing the due course and administration of Justice in the matter of the appeals referred to in the said articles."

7. "That long before the appeals referred to in the said article came on to be heard by this Hon'ble Court, it was well known among the public of Calcutta how the Calcutta Improvement Trust had objected to the hearing of the appeal in which the question of the powers of the Calcutta Improvement Trust was involved by any of the Indian Judges of this Honourable Court and how, as a matter of fact, they through their counsel, Mr. Langford James, adopted the very unusual course of applying in open Court to the Hon'ble the Chief Justice that the appeal case of *The Calcutta Improvement Trust v. Chandra Kanta Ghosh* (2) should not be heard by the Hon'ble Mr. Justice Mookerjee, and how after the decision in the last mentioned case by the Hon'ble Mr. Justice Mookerjee and the Hon'ble Mr. Justice Cuming they had unsuccessfully applied to the Government for legislation for the purpose of doing away with the effect of the said decision. In the circumstances recited the public were watching with deep interest the action of the Hon'ble the Chief Justice, in constituting the Court which would hear the appeals from Mr. Justice Greaves' decision."

8. "I further state that the said articles were published to give

(1) (1742) 2 Atk. 469; 26 E. R. 633.

(2) (1916) 24 C. L. J. 246.

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expression to public feeling in Calcutta and, as stated above, without the remotest intention of scandalising this Hon'ble Court or of reflecting on the conduct of the Hon'ble the Chief Justice or of any other Judges of this Hon'ble Court."

If it be true that the public were watching with such deep interest the action of the Chief Justice in constituting the Court, it seems to me that fact enhances the serious nature of the publication of the articles. For the public in the ordinary course might not trouble its head about the constitution of the Court, and might not pay much attention to the articles; but if on the other hand, the public really was interested in the matter, it would pay attention to them, and it was all the more incumbent upon the author and publisher to abstain from making false statements and groundless insinuations. I may have my doubts as to the "deep interest" alleged in the affidavit, but if it did exist, the seriousness of the publication is greatly increased.

The learned counsel for the printer and publisher urged that his client would be sufficiently dealt with by the proceedings which had been taken and that the Rule should not be made absolute against him. I take into consideration all the learned counsel urged and I sympathise with his argument that the Editor if there be one, or the person responsible for the publication, ought in common fairness to have come forward and borne the burden in respect thereof; the fact that the printer and publisher does not disclose the name of the person responsible for the publication is a factor to be considered when deciding how the printer and publisher should be dealt with. In this case, the printer and publisher has not disclosed the person responsible for the publication, whom of course he must know, though he may not know the actual writer of the articles. On the contrary he has attempted to justify the publication by the paragraphs of his affidavit to which I have referred. It was said by Lord Hardwicke in the case already cited "nothing is more incumbent upon Courts of Justice than to preserve their proceedings from being misrepresented"; and the reason for this must be obvious to everyone. My attention has been drawn on other occasions to articles criticising the High Court. I have found that many of them were unjustifiable, because they were based on statements of facts which were incorrect: but the Court has not taken any notice of them because they were not worth the time of the Court. But this is a different matter, the allegations contained in the articles exceed the bounds of any legitimate criticism and strike at the very root of the administration of justice.

People who are familiar with the administration of the Court would know how impossible the allegations were, but among people who are not so familiar with the Court's administration, such articles as those in question with their groundless insinuations may be very mischievous and pernicious. They contain grave misrepresentations of the proceedings and administration of this Court, and in my judgment we should be failing in our duty if we did not take such steps as are within our power to counteract the effect of them and to vindicate the Court and its authority.

In my judgment, therefore, the Rule should be made absolute against Tarit Kanti Biswas the printer and publisher.

As regards the other four respondents, the evidence before us, apart from the question of its admissibility on the technical grounds which were put forward during the argument, raised a strong *prima facie* case that they were responsible for the publication of the Newspaper containing the articles.

The "Amrita Bazar Patrika Co., Ltd.", was incorporated in 1908, the original Directors being Sisir Kumar Ghose, Moti Lal Ghose and Golap Lal Ghose, for the purpose of acquiring and taking over as a going concern the business of newspaper proprietors, printers and publishers then carried on, and in connection therewith the entire rights including the goodwill of the newspaper called the "Amrita Bazar Patrika" then being published from No 2, Ananda Chatterjee's Lane in Calcutta and all or any of the assets and liabilities of the proprietors of the business in connection therewith and with a view thereto to enter into the agreement referred to in clause 3 of the Company's Articles of Association and to carry the same into effect with or without modification, with the usual subsidiary powers contained in the Memorandum of Association.

The Company gave the statutory notices that it intended to carry on its business at No. 2, Ananda Chatterjee's Lane which was to be deemed its registered office: that it possessed a printing press at 19 and 20, Bagbazar Street, which the Company purchased from Golap Lal Ghose. On the 5th March 1917 the respondents Moti Lal Ghose, Golap Lal Ghose and Pijus Kanti Ghose were the Directors. Golap Lal Ghose and Mrinal Kanti Ghose, were the Managers, and it further appeared that Golap Lal Ghose acted as Financial Manager and Mrinal Kanti Ghose as Secretary. The address of all the four was given No. 2, Ananda Chatterjee's Lane. The Articles of Association (which were put in evidence by M. K. Ghose) provided that the business of the company should be managed by the Directors who might pay all expenses incurred in getting up and registering the

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Company and might exercise all such powers as are not by the Indian Companies Act required to be exercised by the Company in general meeting subject to the provisions of the Act and of the Articles, etc.

It was obviously a family business converted into a limited company. This is confirmed by the list of persons holding shares exhibited in Mr. Hechle's affidavit. The evidence shows that the Directors and Managers were living at the premises which are the registered office of the Company; that the newspaper was published at those premises; that it was the duty of the Directors to manage the business; there was no editor disclosed or any other person occupying a position similar to that of an Editor who would be responsible for the publication and the contents of the newspaper.

From these facts it would naturally be presumed that these respondents were actually engaged in the management of the newspaper and personally responsible for its publication. These Directors were occupying positions very different from those generally occupied by Directors of Companies whose duties are restricted to attending periodical meetings and directing the policy of the Company.

Two of the respondents, Pijus Kanti Ghose and Mrinal Kanti Ghose, however, have put in affidavits and it appears therefrom that Mrinal Kanti Ghose was away from Calcutta on private business at the time when both the articles in question were published and that Pijus Kanti Ghose was away on private business when the second article was published, and under these circumstances I think that the *prima facie* case against them may be said to have been met, and I do not think that either of them should be held responsible in these proceedings for the publication and that consequently the Rule should be discharged as against them.

There are therefore, two directors left to manage the business of this Newspaper at the material times, viz, Moti Lal Ghose and Golap Lal Ghose. Golap Lal Ghose in the evidence is described as Director and Manager and also as Financial Manager. Mrinal Kanti Ghose has sworn that Golap Lal Ghose has only to do with receipts and disbursements of the Company and keeps the accounts thereof.

Under these circumstances, I think the *prima facie* case made against him may be rebutted, and that he should not be held responsible in these proceedings for the publication of the articles, even though it is not alleged that he was not at the premises when the paper was published at the material times, and in my judgment the Rule should be discharged against him.

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- With regard to Moti Lal Ghose, the case is different : I think under the circumstances mentioned above, it may not unreasonably be presumed that he was responsible for or privy to the publication. It was the Directors' duty to manage the business: such business was the publishing of the Newspaper : one of the three Directors was away from Calcutta, another, it is sworn, had only the financial matters to attend to ; Moti Lal Ghose, therefore, is the only Director to whom the particular duty of editing and publishing the Newspaper can be ascribed. As already mentioned, he was not in the position of an ordinary Director, who makes periodical visits to the Company's premises at stated and regular intervals. He was living on the premises where the paper was published and carrying on the family business which had been turned into a limited Company.

There is no Editor disclosed and even in the affidavits which have been put in by Pijus Kanti Ghose and Mrinal Kanti Ghose there is no specific reference to any Editor. There is a general statement only, e. g., the affidavit by Pijus Kanti Ghose runs as follows :—  
“Neither I nor my co-Directors exercise any control whatever over the contents of the “Armita Bazar Patrika” Newspaper, but we perform such duties and exercise such powers as are mentioned and defined in the Articles of Association of the Limited Company.” This is not a convincing statement. It is to be noted that it does not go the length of saying that the Directors did not know of, or were not privy to, the publication of the articles ; if they did know of the inclusion of the articles and allowed the Newspaper containing the articles to be published, they would be responsible.

- Further the main duty of the Directors “mentioned and defined in the Articles of the Company” is to manage the business of the Company, which business is the publication of the Newspaper. Under such circumstances the natural presumption would be, I think, that Moti Lal Ghose, either was responsible for, or at all events, was privy to the publication of the articles. But it has always been held that the jurisdiction which the Court has in respect of a contempt of Court should be exercised with great care and should only be exercised when the case is beyond all reasonable doubt, and this should especially be the case when the proceedings are at the instance of the Court itself. Moti Lal Ghose has made no affidavit nor has he offered any explanation of his position in connection with the Newspaper at No. 2, Ananda Chatterjee's Lane, and if the above-mentioned presumption of responsibility were drawn against him, I do not think he could complain. But I think it is just possible

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that he may not have been responsible for or privy to the publication of the article. Although no reference is made to the existence of an Editor, or some person in the position of an Editor, it is still possible that there may be one who is not before the Court. For there is the general statement by Pijus Kanti Ghose and Mrinal Kanti Ghose made on oath that the Directors do not exercise control over the contents of the Newspaper. Though this general statement be unsatisfactory it cannot be wholly disregarded and it may be that the general control as to the contents of the Newspaper may be vested in the hands of some person who occupies the position of an Editor and who, for reasons known only to the respondents, has not been disclosed, and that consequently these articles may have been inserted without the responsibility or knowledge of Moti Lal Ghose. It is not likely that this was so, but still it is *just possible*, and having regard to the principle that in proceedings of this nature we should be scrupulously careful to see that the case is clear beyond all reasonable doubt, I think Moti Lal Ghose should be given the benefit of that doubt and that the Rule should not be made absolute against him.

In view of the attitude taken up by the respondent Directors, we considered whether a Rule should not be issued against the Company itself with respect to which the considerations which affect the positions of the Directors would not arise; but in view of the fact that the object of the proceedings, viz, the vindication of the Court and its authority had been obtained by the proceedings already instituted, we came to the conclusion that it was not necessary to take up the time of the Court by adding the Company which would necessitate a further hearing.

Before leaving the case of the Directors, I desire to refer to the attitude adopted by them. If the articles were innocently intended the natural thing would have been for the person responsible for them, or for their publication, to come forward and declare his intention: on the other hand, even if they were not innocently intended, one would have expected the person really responsible for their publication to come forward and take the responsibility on his own shoulders as was done in the case of two well-known newspapers in Calcutta on previous occasions\*. They have chosen not to do so, but to leave the Printer and Publisher to bear the brunt of the matter.

\* *In re Banks and Fenwick* (1869) 26 C. L. J. 401 and *Surendranath Benerjee v. The Chief Justice of Bengal* (1883) L. R. 10 I. A. 171; L. R. 10 Calc. 109<sup>2</sup> Rep.

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- It is further to be noted, that although it was evident that the Court, by issuing the Rule, regarded this as a matter reflecting upon the Court, although it has been admitted that the second article contained statements of fact which were entirely untrue, and consequently that the insinuations based thereon were groundless, although two of the respondents' learned counsel admitted that the article, to say the least of it, was a piece of great impertinence, not one word of apology has fallen from the Directors of the Company.

As regards the many technical points raised by learned Counsel as to the admission of the evidence, I do not think it is necessary for me to discuss them; none of them affect the case of the printer and publisher. I would only say that I have had the opportunity of reading Woodroffe, J.'s judgment, and I agree with him that most of them were trivial and unsubstantial. The Court was occupied over these proceedings for two and a half days: some part of the time no doubt was taken up by the discussion of the meaning of the articles, but the greater part was devoted to technical objections relating to the evidence and to the question as to who was really responsible for the publication. This fact shows how essential it is that the legislature should provide for the registration of the Editor or the person really responsible for the contents of a newspaper, so that the responsibility might be placed in the proper quarter without any difficulty or delay.

For the above-mentioned reason, in my judgment, the Rule should be made absolute against Tarit Kanti Biswas, the Printer and Publisher, and it should be discharged as against the other respondents.

- Woodroffe J.**—The arguments before us (other than those of Mr. Norton for the printer) would suggest that the parties regarded this Rule as an opportunity for a legal *tamasha* to use an expressive if not judicial term rather than as a proceeding taken in the public interest to ascertain the true facts. Divorced from the lengthy and unnecessary discussions before us and freed of obstinative tactics the matter is really quite a simple one and might have been decided with but little delay. In that case too our judgments might have been short but the exuberant argument calls for some answer.

The parties before us are the directors, managers, and secretary of the *Amrita Bazar Patrika Ltd.*, a small company seemingly a family business which owns and runs a Calcutta newspaper called the *Amrita Bazar Patrika*. With them is joined their printer. Ordinarily of course a newspaper has an editor but this company or some of its members has been very secretive on the question whether there

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is an editor and if so who he is. This is not the first time that the editor, if there be one, has been kept in the back ground. Perhaps it was considered that such secrecy was a convenient policy in defence of proceedings against the paper. Whatever be the object these persons have so far successfully concealed the fact and name of their editor. In the present proceedings it was not unreasonable for the Court to think that a summons to the directors, managers and secretary, was sufficient without notice on the company and that the officers of the company would disclose the actual facts. What actually occurred at the trial has shown that no assistance can be expected from the company's officers and on a future occasion it will be necessary to consider whether the Court should not proceed against the company and its property. Such difficulties as we have experienced would be remedied were a law enacted compelling the registration of the names of editors just as the English Newspaper and Registration Act 1881 (44 and 45 Vic C. C. 6) compels the registration of the names of the proprietors. As the Court was not in possession of evidence whether there was an editor or who he was, proceedings were instituted against those persons who are empowered to manage the business of the company and against its printer.

On the 18th and 22 May last two articles appeared in this newspaper which seemed to the Chief Justice in consultation with the Judges of the Court to be a contempt. The writer circulates what he calls "mischievous rumours" and "unsavoury impressions" and makes statements which suggest that a litigant before the Court namely the Calcutta Improvement Trust had been successfully intriguing to get a Bench of its choice to hear an appeal from the decision of Greaves J. As such an intrigue could not succeed without the connivance of the Court such a statement was scandalising the Court as it is technically called. Nextly, as the allegation of such an intrigue touches the party said to be carrying on this intrigue the tendency of such writing is to prejudice that party. Thirdly the articles are calculated to interfere with the administration of justice, for the writer seeks to do, though in his own way, what he complains of in the case of the litigant Trust namely to influence the Chief Justice to form a Bench to hear the appeal in question, the Bench to be of such composition as the writer approved. As it seemed to the Court that *prima facie* a contempt had been committed, a Rule was served upon the persons mentioned to show cause: that is, they were given the opportunity of showing that the articles were not contemptuous, and if they were, that they were not responsible for them.

The parties whom we called for, have come before us. Leaving

aside the printer, their substantial contention (to be extracted from the general mass of objections and arguments) is that the business in which they are each engaged has nothing to do with the control of the contents of the paper; that is, their work is not of an editorial character. One of them swears that he was out of Calcutta when both the articles were published and another that he was away from Calcutta when the second and chief article appeared. The printer says that he has no control of the contents of the paper and that he printed what was given him without first reading it. Two parties Moti Lal Ghose and Golap Lal Ghose have filed no answer at all. All parties have refused to state whether there is an editor but they all contend that we are quite mistaken in supposing that the articles are a contempt. On the contrary we are told that the writer of these articles was a man who had perfect faith and confidence in the Chief Justice and Judges; that, he was solicitous for their honour and was only seeking to protect and counsel the Court from and in respect of certain "mischievous rumours" and "unsavoury impressions." In short, he was the Court's benefactor who thought that if it would but follow his advice as to how it should conduct its business, it would escape the "unsavoury" imputations which the public were making against it. This was said by some of the learned Counsel to be so clear that Mr. Jackson affirmed that no case could be found in all the reports which approached the present one in the weakness of the alleged contempt. If there be anything in all this, what should the parties have done? Each of the directors should have put in an affidavit exculpating themselves from being privy to the publication. The reading and examination of these affidavits might have taken half an hour. If these affidavits were accepted as truthful and the editor had been named, these parties other than the printer would have been discharged within about half an hour of their appearance before us instead of, as now, after a protracted argument for three days. We should have then expected that the parties would have named and produced their editor the more particularly that the articles for which he would have been responsible are alleged to be of a wholly innocuous character, and their author to be one who cherishes the honour of this Court and would be its adviser and protector. But strange to say this man of alleged good and disinterested motives is not named or produced. What had he or the parties to fear assuming that their argument as to the meaning of the articles is correct. Can it be said that notwithstanding such excellent intentions he was yet afraid that we might deal with him unjustly. If so, the writer's professions of his perfect faith and con-

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fidence in the Court are a pretence. If he had come here and had explained what notwithstanding the form of his expression he actually meant; if he had come here and said (as has been suggested by others in his absence) that he gave no credence to these rumours, that he personally made no suggestion against the Court, which in fact he was seeking to counsel and protect; if, I say, he had satisfied the Court of his innocence, then he too would have been discharged, and necessarily with him the printer. As a fact, the position taken up before us is "we refuse you all information. Prove what you can against us." Such affidavits as have been put in show that they have been elaborately drawn so as to keep out information. If, as in my opinion, there is a case made out, calling for an answer, it is obvious that the non-disclosure and non-production of the editor or writer leads to the inference that he or they are withheld because upon a true construction of the articles they do in fact constitute a contempt and that there is no reality in the argument which would have us hold that there was no contempt at all. If so, why all this secrecy and technical objections as to jurisdiction, procedure, nature of contempt, evidence and so forth.

It is first objected that we have no jurisdiction and if we have and if there was a contempt the affidavits issued with the Rule do not make any case calling for an answer, and if it did call for an answer on the assumption that the articles constituted a contempt, they are not a contempt in fact, and lastly, if they do constitute a contempt, two of the parties were not in Calcutta at the time of the publication of one or both of the articles.

As regards jurisdiction a number of stale objections were taken. It is not necessary to go into the history and nature of contempt. It is too late now to contend that we have no other jurisdiction than that conferred by the Indian Penal Code or that in exercising this jurisdiction we are Judges in our own cause. The jurisdiction has been approved many years ago by amongst other Judges their Lordships of the Privy Council. The second observation applies to all cases of contempt, and if it were given effect to, the Court would be deprived of its jurisdiction in every case. In the present one, the Court as it is entitled to do, issued the Rule of its own motion. The Court however in such cases does not seek to vindicate any personal interests of the Judges but the general administration of justice which is a public concern. It is not a fact that proceedings for contempts by scandalising the Court are obsolete as Mr. Jackson argued. There are moreover special reasons in this country why this jurisdiction should be maintained which I need not here develop.

I may however refer in this connection to the observations in *McLeod v. St. Aubyn* (1). The point of jurisdiction has been laboured with a view to establish the point that the case before us should be decided as a criminal one. It is what is called a "criminal" contempt, but all proceedings whether in respect of civil or criminal contempts are in my opinion of a criminal nature when and in the sense that they are *in pœnam*, that is, when their object is to punish by fine or imprisonment. It does not however follow that the procedure in such cases is in all respects the same as an ordinary criminal case. It is obviously not. For if it were the parties before us would have been in the dock and (not to speak of other matters) no affidavits could have been filed by or against them. In fact both the offence as also the jurisdiction and procedure under which it is tried are *sui generis*. As regards the question of proof, no case either civil or criminal should be tried and determined otherwise than according to the law governing it. It is not the fact that civil proceedings may be slack and criminal proceedings must be strict. A dereliction of duty may of course be of greater or less moment according to the nature of the proceeding on which it happens. As regards the standard of proof I would repeat what was held in *Weston v. Feary Mohan Dass* (2); that there is but one rule of evidence which in India applies to both civil and criminal trials and that is contained in the definition of "proved" and "disproved" in section 3 of the Evidence Act. Whether the case is civil or criminal, a fact is only proved or disproved if it comes within the terms of that section. It may be conceded that the case against the persons before us must be proved strictly which means according to law. That charge is that the two sets of parties before us, namely, printer and publisher of the newspaper *Amrita Bazar Patrika* and the directors and manager of the *Amrita Bazar Patrika Ltd.*, committed a contempt of Court by publishing and being privy to the publication of the articles of the 18th and 22nd May set out in the Affidavit of the Registrar. The first question is whether these articles constitute a contempt of Court, and then if so, who, if any, of the parties before us are responsible for it. Learned Counsel who appeared for the various parties have offered different arguments as to the construction of the articles. The actual facts which are undisputed are that some cases were instituted against the Calcutta Improvement Trust on the Original Side of this Court before Greaves J. which failed, that learned Judge holding that the Calcutta Improvement Act gave the Trustees a power to

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(1) (1899) A. C. 549 (562).

(2) (1912) I. L. R. 40 Calc. 898.



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acquire land by way of recoupment. Another case against the same Trust came up for hearing on appeal from the moffussil. Previous to the hearing by this latter Bench on the appellate side of the Court an application was made by Counsel for the Trust to the Chief Justice for the transfer of the case from the last mentioned Bench on the ground that Mookerjee J. was a landowner and therefore personally interested. That application was refused on the ground that the learned Judge would himself determine whether the circumstances were such that he should hear the case or not. The objection was not repeated before the learned Judge himself and the case was then heard on the appellate side of the Court by Mookerjee and Cuming JJ who held that the Trustees had no such powers. After that there was then an appeal to the Privy Council by the Trust against the decision of Mookerjee and Cuming JJ., and an appeal by the parties suing the Trust against the decision of Greaves J., to this Court hearing appeals from the Original Side. The Judges who had been previously taking such appeals were the Chief Justice and myself. On the 18th May 1917 the first of the articles appeared. Its salient points are these:—It alleges the existence of a "mischievous rumour which should be contradicted." The writer does not himself contradict the rumour but gives it further currency. That rumour was stated to be that an attempt was being made by or on behalf of the Calcutta Improvement Trust "to get up" and "secure" a Bench after its "own heart" to deal with the appeal from the decision of Greaves J. so that that Bench might act "as a counterpoise" to the Bench of Mookerjee and Cuming JJ. Expressing confidence in the Judges the writer says that he does not think that any official of the Trust "can go so far."

The Benches of this Court are appointed by the Chief Justice, it may be in some cases, after consultation with the Judges. It is of course plain that a litigant could not "get up" or "secure" a Bench of his own "choice" and after his own heart except with the complicity of the Chief Justice or Judges. Of this the writer of the articles is well aware for he says that he is "sure the interest of every ratepayer is safe in the hands of the Hon'ble Judges" and he "does not think that any official of the Trust can go so far." As I have said, the Original Side appeals were then being heard by a Bench of two Judges, namely, the Chief Justice and myself. A hearing of Original Side appeals by two Judges is not a convenient one nor in conformity with old practice, but it has been in existence for several years since Sir Lawrence Jenkins' time owing to the great bulk of work and the shortage of Judges to deal with it. It is not con-

venient because it is advisable that there should be a third Judge to turn the scale in cases of difference of opinion. As the appeals under consideration involved a question of great public interest and might involve a reference to a Full Bench, the Chief Justice with my concurrence determined to appoint a third Judge to meet the possible case of a difference of opinion and a practically infructuous hearing. A third Judge has been added to the usual Bench of two Judges on the previous occasions. The third Judge added was Chitty J., the next senior Judge to myself excluding Mookerjee J. who had tried the Improvement appeal which raised the same question as that which the appellate Court hearing the appeal from greaves J's decision had to determine. Before the constitution of the Bench was actually published, the second article of the 22nd May appeared. That article is based on a number of misstatements. It wrongly assumes that there was an appellate Bench constituted to hear "appeals against the awards of the improvement trust." It wrongly states that this supposed Bench was composed of Mookerjee and Cuming JJ.; it then wrongly states that this Bench had latterly come to be presided over by the Chief Justice and myself. It then says that the "withdrawal" of Mookerjee J. (which is not true) had "given rise to rather unsavoury impressions in the public mind" since this supposed "withdrawal" and supposed reconstitution of the Bench followed "close upon the heels of his judgment" in the case I have mentioned. The suggestion involved in these alleged impressions is of course that Mookerjee J. who is supposed to have had charge of Improvement Trust cases was "withdrawn" because he had decided against the Trust. He could not himself "withdraw" of his own motion, nor can any one else but the Chief Justice who appoints the Benches. But why should he be so "withdrawn?" The first Article suggests the reason, namely, that the Improvement Trust was endeavouring to get up and secure a Bench after its own heart as a counterpoise to the decision of Mookerjee and Cuming JJ. Then it says "something like consternation prevails on account of the proposed new constitution of the Appellate Bench," that is, by the substitution of the Chief Justice and myself for Mookerjee and Cuming JJ., the "withdrawal" of Mookerjee J. which had given rise to rather "unsavoury impressions," the addition of Chitty J. and the non-selection of any Indian Judge. It suggests that the presence of one or more of these was necessary because of the knowledge of local conditions. I may here observe that the printer sought to prove good faith by amongst others the allegation that it was well known that the Trust objected to their case being tried by any

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Indian Judges. The point before the Court in the Trust cases was a pure question of law equally well triable by either an English or Indian Judge unless we accept Mr. Jackson's strange argument (from which Mr. C. R. Dass dissented) that that Judge is best qualified to try such cases who is interested therein by reason of his possession of land in Calcutta. Reading this second article in connection with the first, the inference to be drawn from it, in the absence of any explanation from its writer, is that the alleged machinations of the Trust to secure a Bench "according to some body's choice" had succeeded and that the Bench which was to hear the appeal from the decision of Greaves J. was packed. Of course, there is no question but that if this was the suggestion there has been a gross contempt of Court. Mr. Norton who appeared on behalf of printer and publisher contended that the two Articles should not be read together. There is no substance in this. But he frankly conceded that if the two Articles be read together then they were capable of the abovementioned interpretation, though he did not admit that that was meant and suggested that the writer did not understand the meaning of the word "unsavoury." But how can we say that when the writer and editor are not before us?

Mr. Jackson's argument lends support, though perhaps unconsciously, to the construction I give to these articles. For he has endeavoured to reconstruct what he called the atmosphere in which they were written with a view to show that the writer acted in the public interest and in good faith. But when a person has written nothing which is *prima facie* an offence, a plea of good faith is unnecessary. It is only relevant on the assumption that the articles do on their face appear to be contemptuous. It is then said that the writer was only repeating rumours to which he himself did not give credence. One cannot escape either contempt or libel merely by alleging that there was a rumour. This is a common way in which libels are spread. The existence of a rumour if there was one in fact, is no justification in itself for its repetition. Moreover the writer associates himself with these alleged public suspicions. Thus he says "now what neither the public nor ourselves can understand" and so forth. And in further dealing with the matter he refers to a contention which the Chief Justice will not "care to advance."

Then it is said that the writer was merely stating the existence of these "unsavoury impressions in the public mind" in the interest of the Court so that they might be contradicted. It is said that he has more than once expressed his perfect faith and confidence in the Chief Justice and Judges. That is so. It is an obvious question

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to ask why if the writer meant no offence but was only acting for the Court's good, he was not brought forward. What had he to fear? Will it be suggested that the fear is that nevertheless the Court might deal with him unjustly. If so, this is as I have said the strongest argument against the sincerity of his professions of faith and confidence, in the Judges. In my opinion, it is not possible to accept an argument that the writer meant no offence and was merely acting in protection of the Court from unsavoury public impression, when he is not even named, much less brought forward. Moreover, the article itself does not, in the absence of any explanation from him, support this view. It states certain alleged rumours. It misstates the facts which are supposed to be the cause of these rumours. It does not contradict these rumours and say and show that there is nothing in them. It on the contrary gives them circulation. The writer associates himself with those who are said to entertain these alleged unsavoury impressions. He writes in a way open to the inference that the alleged manoeuvres of the Trust had succeeded. It may be that these expressions of faith and confidence and so forth were inserted to use an expressive phrase of counsel for the "protection" of the writer. It is possible that if the editor or writer had appeared before us, he might have succeeded in showing that however apparently unfavourable to him the language of these articles is, yet in fact no offence was intended. But he is not produced and we must give them what seems to us their natural meaning. It has been held that even where the writer knew that proceedings were still pending, the fact that he did not desire or intend to prejudice the case is immaterial (except as to the extent of his punishment) if the Court be satisfied that such was the obvious and necessary result of his words. *Daw v Eley* (1); *In re Martindale*, (2) *In re Marquis of Townshend* (3). In the absence of the editor or writer, I can only and do infer the intent from a consideration of the natural meaning of the words used and the impression which I believe they would convey to the ordinary reader of them.

In the present case the articles not only scandalise the Court but are otherwise a contempt. For it is a contempt to prejudice or attempt to prejudice a litigant and to interfere with the course of justice. Here the Trust is a litigant in this Court and it is suggested that it has been attempting to influence the course of justice by trying to "get up" a Bench of its "choice" of which allegation there is no proof whatever. Nextly, the writer of the article himself seeks

(1) (1868) L. R. 7 Eq. 49.

(2) (1894) 3 Ch. 200.

(3) (1906) 22 T. L. R. 341.

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to control the formation of the Benches in his own way by putting forward alleged unsavoury impressions in the public mind based on a number of wholly unfounded statements, adding that as soon as the Chief Justice understands the supposed public feeling in this matter, his Lordship would form a Bench of a nature which the writer approved. In my opinion, the articles do constitute a contempt of Court.

I now pass to the question as to which if any of the parties before us are responsible for it. Mr. Norton for the printer and publisher Tarit Kanti Biswas has conceded that if we hold that there is a contempt, then his client is liable though he pleads for mitigation of punishment—a matter with which I later deal. This liability is obvious because *scienter* is attributable both to printer and editor. Neither can escape liability by alleging that he did not know that the contemptuous words had been inserted in his newspaper. *Cheshire v. Strauss* (1), *R. v. Parke* (2), *R. v. Davies* (3), *Ex parte Jones* (4). As regards the others, the affidavit of Mr. Hechle the Registrar shows that the paper is, according to the imprint, printed and published at the Patrika Press 19 and 20 Bagbazar street, and issued by the Patrika Post Office, Calcutta. This Patrika Press works for the Amrita Bazar Patrika Company Ltd. which was incorporated with the object amongst others of carrying on the business of newspaper proprietors by printing and publishing newspapers and taking over the rights in the previously existing Amrita Bazar Patrika newspaper. The registered office of the company is 2 Ananda Chatterjee's Lane, Calcutta. A certified copy of the annual summary shows that Moti Lal Ghose, Golap Lal Ghose and Pijus Kanti Ghose are directors and Golap Lal Ghose abovementioned and Mrinal Kanti Ghose are managers. It will be observed that all these persons are named Ghose and they all give the same address which happens also to be that of the registered office of the company.

The total number of shares taken up is 766. Of these only 16 were issued for cash probably for the expenses of incorporation and 750 for a consideration other than cash. These shares of 100 Rs. each are held by 15 persons. The Ghose directors and managers hold 369 shares, three other persons of the name of Ghose hold 234 shares. There are four lady proprietors holding 112 shares and against the name of the first the father's name is given as Moti Lal Ghose. It is not clear from the summary whether the latter stands

(1) (1896) 12 T. L. R. 291.

(2) (1903) 2 K. B. 432.

(3) (1906) 1 K. B. 32.

(4) (1806) 13 Ves. 237.

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in the same relation to the other three ladies. There is one person of the name of Datta who holds 51 shares. The addresses of all these persons (the ladies and N. G. Datta included) is given as 2 Ananda Chatterjee's Lane, showing that this is a place of residence as well as being the registered office of the company. It is obvious on this evidence that these persons are related, that they live at the same address which is the registered office, and that the company is merely a small family business incorporated.

All the persons cited except Mrinal Ghose are directors. The latter is described as manager (with Golap Lal Ghose) and also as secretary. That Pijus Ghose and Mrinal Ghose are director and manager respectively, is also admitted in their affidavits. As regards Moti Lal Ghose and Golap Lal Ghose who have filed no affidavits, a number of technical, and in my opinion trivial, objections have been taken. The first objection taken by Mr. C. R. Das is that there is no proof that they are directors, notwithstanding that their co-director and secretary have sworn that they are, and they have themselves declined to give any information on any point to the Court. The argument is based on the contention that the certified copy of the summary filed on the 9th May 1917 of share capital and shares etc. as they stood on the 5th March 1917 purporting to be signed by Golap Lal Ghose as financial manager, was not admissible. Mrinal Ghose's affidavit states that Golap Ghose is a director and financial manager, but Mr. C. R. Das contended that this is not admissible against him nor (it must follow) against Moti Lal Ghose. It is not necessary to go into this last objection, for I think that the summary was a public record of a private document, of which a certified copy is admissible. [Evidence Act, Sections 74, 75, 65 (e.)]. It has been argued that "record" in 74, cl 2, refers only to the case where the public office itself makes a copy, that is record of a private document, and keeps it. If it does, it is certainly a public record. But "record" does not merely mean this. The word record also means a collection of documents. Section 74 (2) refers to private documents made by private persons and kept as a record in public offices to which the public have generally access. If this were not so, how could the public get such documents? The originals being in the custody of a public office the latter would not part with them, and not being a public document no certified copy could be given.

The next objection is that if the certified copy is admissible, there is no proof of the signature of Golap Ghose. Assuming that the mere production of a certified copy is not such proof where proof is necessary, it is not necessary here. Such certified copy is proof that

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some person giving the name of Golap Lal Ghose and describing himself as financial manager of the company signed such document. As that document was accepted by the Registrar of Joint Stock Companies, it is common sense to assume that he was satisfied that it was a return by the financial manager of the company. The objection therefore in substance is that the Golap Lal Ghose who purports to sign this document is not or at any rate has not been shown to be the identical Golap Lal Ghose for whom Mr. C. R. Das has pleaded before us. It is admitted that the objection is technical. That is true, but we must see if alleged technicalities are sound and we must give as much play to common sense as the law permits. The rule was served on Moti Lal Ghose and Golap Lal Ghose as directors of the Company. These are the persons whom we wished to see not any body else. The persons, so served come here. If they were not the persons described in the summons they need not have come here. They can only be heard in these proceedings on the supposition that they are what the Rule states them to be. It is not open to anybody and every body to come and show cause against this Rule. Mr. C. R. Das's title to be heard at all is dependent on the assumption that he represents the person described in the Rule. The unreal nature of the objection is enhanced by the fact that the secretary of the company has sworn in these proceedings that Golap Ghose and Moti Lal Ghose are directors. If it be, as contended, that we cannot refer to this affidavit when dealing with the case of Golap Ghose and Moti Lal Ghose (a matter I do not decide) this does not make the taking of such an objection any the more sensible. Objections should even when legal have some relation to reality.

The third legal objection is that assuming that the return is proof of the state of affairs on the 5th March 1917 and shows that these two persons were directors on that date, it does not follow that they were directors when the Rule was issued on the 30th May, 1917. It is to be observed firstly that apart from any presumption of continuance, the summary was filed on the 9th May only three weeks before the issue of the Rule which was not likely to be done had there been any change between the 5th March and that date. Further under section 87 of the Indian Companies Act VII of 1913 changes of directorship are required to be notified by the company, and had there been any change, it would have appeared in the affidavit of Mr. Hechle the Registrar as the result of his recent enquiry in the matter. Nor it is likely that the Registrar of joint Stock Companies would issue to an enquirer a certified copy of a return which had

been changed. This objection is as unreal as the rest. I have no doubt whatever that Moti Lal Ghose and Golap Ghose are directors apart from the affidavit of the secretary of the company who states that they are in fact such.

According to the Articles of Association produced with the affidavit of Mrinal Ghose, the business of the company is to be managed by the directors, that business being according to the Memorandum of Association the carrying on the Amrita Bazar Patrika newspaper. But here again with further luxury of objection it is protested that we cannot look at the Articles of Association of the Company of which these two persons are directors and which have been actually produced by the secretary of the company with his affidavit. It is sufficient to say that the affidavit of the Rule states who are directors, the nature of the company and the facts proved indicate that its business must be carried on by them; and the provisions of this article are the same as and are indeed copied from section 75 of Schedule 1 Table A of Act VII of 1913, the provisions of which, unless otherwise arranged, apply, to all companies. The Table of the earlier Act is on this point substantially the same. It has been therefore proved as against the parties named as directors that they are such.

The question whether persons in the position of directors are responsible must depend on the facts of each case. *In Re Judd* (1), the directors of Judd & Co. used to print and deliver a newspaper to another Company who published the same. They did not, it was held, sell or deliver, a fact which would relieve them from even civil liability. In *ex parte Green* (2), the manager of a limited company which disseminated paragraphs amounting to contempt of Court was held responsible. In that case the manager denied that he had seen the matter before it was published and that in general, it was no part of his duty to supervise the reading out of news. The affidavit of the party taking proceedings spoke only to his "information and belief" as to the responsibility of the manager. This was held to be, *prima facie*, sufficient and on the letters and affidavit, he was held guilty. In one case it was held that the individual liability had not been directly established and in another that it had been. Doubtless, in the case of an ordinary large newspaper company where the directors meet together once a week to transact business in the board rooms, the ordinary inference might be (in the absence of direct evidence) that they were not conscious of the

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(1) (1888) 37 W. R. (Eng). 143 ; 16 Cox 559.

(2) (1891) 7 T. L. R. 411.



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publication of a particular article, for in the case supposed they would have appointed an editor.

The facts in the present case are very different and peculiar. In *Legal Remembrancer v. Motilal Ghose* (3), a statement resting on information and belief that Moti Lal Ghose was editor was ruled out as not being legal evidence and the fact that Moti Lal Ghose did not in that proceeding deny the allegation was held immaterial. No disclosure was made as to whether there was an editor or who he was. Ordinarily of course a newspaper has an editor but we have no legal evidence of that in this case and the affidavits filed by one of the directors and the secretary, printer, do not even mention the existence of such a person. The company as I have said appears to be a small family affair composed, in the main, of Ghoses whose address is that of the registered office of the company which is also given as that of some ladies one of whom at least is the daughter of Moti Lal Ghose. Three of these Ghoses including Moti Lal Ghose are directors and another Ghose is secretary. The Articles of Association direct, not that the business shall be under their control but that they shall manage the business. That business is shown to be the carrying on of the newspaper Amrita Bazar Patrika which is "now being published from No. 2 Ananda Chatterjee Lane." Some one must see to the literary part of this business. In the absence of evidence as to there being a separate editor, *prima facie* the directors who are authorised to manage the business are the persons who do so in all its aspects. They must have authorised the circulation of the paper. Had there been reliable evidence that there was an editor who was some person other than the defendants even though his name was not disclosed, *prima facie*, the responsibility for the articles would have lain with the editor, though of course the directors or other persons would also have been liable who were shown to be privy to the publication. Here there is evidence that the management of this business is entrusted to the directors. That business includes every department of it, financial, literary and so forth, for, there is nothing to prevent one or other of the directors being also editor. This is the inference which arises on the facts here proved. If the directors have in fact delegated any of these functions to some other person it is for them to show that fact. I am of opinion, therefore, that the affidavit in support of the motion disclosed a *prima facie* case against the directors as such and calling for an answer from them. As regards the permanent manager and secretary, I deal later. Having

(3) (1913) I. L. R. 41 Calc. 173 ; 18 C. L. J. 452.

regard to the facts proved I need not further consider their case here.

But assuming that the affidavit accompanying the Rule does make a case calling for an answer, the matter does not rest there. Pijush Kanti Ghose has put in an affidavit and has sworn that neither he nor his co-directors exercise any control over the contents of the newspaper and exercise "only such powers as are mentioned in the Articles." Who does control the paper is not stated. A similar statement is made in the affidavit of Mrinal Kanti Ghose. Nextly the affidavit of Pijush Kanti Ghose swears that he was away from Calcutta on the date of the second or chief article. Therefore he is shown not to have been directly privy to it. Similarly, the affidavit of Mrinal Kanti Ghose states that he exercises no control over the contents of the newspaper, that his duties are to keep the minutes, registers and records of the Company, to issue notices and to make returns. Further he swears that he was absent from Calcutta on both the dates when the articles appeared. He has therefore also met the case against him. There remains the cases of Golap Lal Ghose and Moti Lal Ghose neither of whom have given any answer. The abovementioned affidavits state that Golap Lal Ghose also has no control over the contents of the paper and this statement is supported by the fact that the return the latter made to the Registrar of Joint Stock Companies shows that he is financial manager. Ordinarily therefore he would attend to this side of the business and probably to this only. There lastly remains amongst the directors the case of Moti Lal Ghose. He also has not filed an affidavit and we are told less about him than any one else. The affidavits offered to us seem to be of what is called a "tricky" character. The wording is in the present tense. As was pointed out by my brother Fletcher they might not support a prosecution. They do not deal with the condition of things when the articles were published. They do not state precisely what powers the directors do exercise, or whether there is an editor. The statement that the directors have no control over the contents does not show that they were not aware of the articles before they were published and circulated by their authority. Had there been no affidavits, I would have been disposed to adjudge that Moti Lal Ghose was in contempt; even after the reading of these affidavits, my mind has been in doubt, for the affidavits are deliberately drawn to keep all information from the Court and are as above stated otherwise unsatisfactory. Moti Lal Ghose has filed no affidavit. Though it has been objected by counsel (Mr. C. R. Das) for one of the parties, that

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we cannot consider as against any particular party the affidavits offered in defence by other parties (a point I need not consider,) still I am unwilling as against Moti Lal Ghose to rest the case on any such technicality. I cannot shut my eyes to the fact that there are three sworn statements before us that neither the directors, financial manager, secretary or printer have control over the contents of the newspaper. As I said, I have had my doubts as to the sufficiency of this statement. Moti Lal Ghose (whose case I regard with strong suspicion) is however entitled to the benefit of them. As some one must have such control, we must now assume after the reading of these affidavits that there is an unnamed editor who is not before the Court. I conclude then that the affidavits offered in reply to the Court's Rule are such that it should be discharged against the parties to these proceedings other than the printer and publisher Tarit Kanti Biswas. We might, without all this complex argument have come to the same conclusion within half an hour if all the parties had sworn that they were not responsible and disclosed the name of the editor who, subject to any explanation he might make, was liable. As already stated, it is conceded by his counsel Mr. Norton that the printer is liable provided that the articles constitute a contempt. He has however argued that the case is not of so serious a character as to call for the exercise of this jurisdiction, and if it is, he lastly pleads that the position of his client should excite our pity and that we should discharge him without penalty.

In my opinion, the case does call for the exercise of this jurisdiction by reason of the articles scandalizing the Court, having a tendency to prejudice the parties and to interfere with the administration of justice. As regards the action to be taken and penalty to be awarded, each case must depend on its own facts.

As regards the second point, I cannot yield to the suggestion that merely because a man is a printer and publisher he should escape scot-free. Did we hold this, it would be open, as in this case, for the parties, to exculpate themselves by affidavit and to suppress all information as to who was in fact responsible. The printer might also be put up to refuse such information and be told "it is all right, say you are only the printer and ask for pity and then we shall all be excused." Our jurisdiction would thus become largely illusory. I do not say that there may not be cases where the Court will deal leniently with the Printer, but this is not one. In the first place, he states in his affidavit that it was known to him that the matter dealt with by these articles was the subject of concern to the public "who were watching with deep interest" the action of the

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Chief Justice in constituting the Court to hear the appeal from the decision of Greaves J. He then says that the articles were published to give expression to public feeling in Calcutta and that the "articles were published by myself in good faith and in the public interest." This statement is on its face, in conflict with paragraph 3 of his affidavit where he says that he did not read the articles before publication nor did he consider at any time prior to their publication their meaning or purport. If this be true how could they have been published by him in good faith and in the public interest? According to his own statement, he was aware that the subject was creating public interest, and he is prepared to swear that the articles were published to give expression to public feeling. If there were, in fact, such an interest, there was the greater necessity for caution on his part in seeing what he published with reference to it. His statement that in fact he did not see the articles before publication is weakened by the attempted justification that they were published "by myself in good faith and in the public interest" though it is of course possible that this inconsistency was due to bad drafting. As, however, the affidavits are in general astutely drawn we cannot well assume this. He denies that the articles are a contempt and seeks to justify himself. In this he fails. Next, he says that he has no control over the contents of the newspaper and that they were handed to him for publication in the usual course of his business. He carefully refrains from saying who gave him the articles, whether it was the editor who did so, or who he was. His counsel justifies this refusal on the ground of loyalty to his employers. If he esteems that loyalty above his public duty to inform the Court who committed this alleged offence, he can not complain that we do not show him indulgence. He joins with the others in refusing information and if, apart from such refusal, he is liable, he must take the consequences. The Courts in England have held [as for example in *In re American Exchange in Europe* (1)] that this refusal by the printer to give up the name of the editor is a matter which will weigh with it in determining whether a penalty shall be awarded against the printer or not. Mr. Norton has complained (I thought with that moderation which rarely goes with real zeal) that his client should be left to suffer because his employers have not produced their editor. In the Englishman contempt case [*Re Banks and Fenwick* (2)] captain Fenwick the editor of that paper came forward to bear the brunt of what was in reality done by him or his order on which the Rule was withdrawn against the printer. Sir Barnes Peacock

(1) (1889) 58 L. J. Ch. 706 (707).

(2) (1869) 26 C. L. J. 401.

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observed that in doing that captain Fenwick had only done "that which every honourable gentleman who fills editor's chair would do, in not allowing a publisher of a paper to take the consequence of articles written and published by his order by not coming forward to avow the authorship." This was also done by Babu Surendra Nath Banerjee in the well known "Bengalee" Contempt Case [*Surendra Nath Banerjee v. Bengal High Court* (1).] where Garth C. J. said that Babu Surendra Nath Banerjee had properly done his best to protect his printer. There is no disposition however upon the part of any one in this case to adopt this proper and honourable course. But the printer himself does not deny that he is ignorant who the editor is and he himself through his counsel declines to give his name. There are some cases in which one might sympathise with the printer, but here he has not only declined to give up the editor's name, but has otherwise associated himself with the other parties in the case and has sought to justify both himself and them in what I hold to be a contempt, and he must therefore take the consequences such as they are. In, however, adjudging the penalty I have not wholly left out of count the fact that he is the printer, for, had the editor been found guilty of contempt, he would in my opinion have been subject to much heavier punishment.

The defence to these proceedings except as to the construction of the articles—a legitimate argument—was ill advised and a waste of time. If the directors, managers, and secretary were not personally responsible for the contempt, they had only to frankly state the facts on affidavit and disclose who was so liable. The printer similarly who in law is liable, might have stated the persons from whom he got the articles he printed and thus have personally freed himself from all further action against him. We should then on the supposed facts have only had to deal with the person primarily liable, namely, the editor. He could, then, if he had wished, have personally put forward the plea here advanced that the articles have been misunderstood and that on the contrary he was moved by a desire to act in the interest of the Court and to protect it from "mischievous" and "unsavoury" rumours. If this were the fact, he would have nothing to fear from Judges who according to the argument before us had the complete confidence of the writer of these articles. Even if these articles were ill expressed and capable of a bad interpretation their effect might have been negated by the public avowal of their author that for him they had no such meaning. These proceedings might have thus been disposed of within an hour or less, with

(1) (1883) L. L. R. 10 Cal. 109 (121).

the result that either all parties might have been freed of penalty or if penalty were awarded it would have fallen on the party primarily liable, namely, the editor. On the contrary, all the parties before us have adopted a hostile attitude to the Court, have refused all information, concealed the name of the editor and put forward every technical objection to defeat an enquiry which has thus been prolonged over three days with unnecessary delay and expense to the public and the parties concerned. For this the parties, by the course they have adopted, are responsible. This course further has strengthened the inference which is to be drawn from the natural language of the articles in the absence of explanation from their writer. It is not in such absence to be supposed that the intentions of the writer and editor of these articles were as innocent as the argument before us suggests and that the name of one who was, it is said, only seeking to protect this Court from unsavoury rumours and to give it what he thought good advice should be kept concealed. It is absurd also to suppose that the party responsible would himself, if innocent, carefully avoid the presence of the Court which it is said he honoured and was seeking (however ill considered his language might be) to counsel and protect.

I therefore concur in the order which the Chief justice has made.

**Mookerjee J.**—On the 18th May, 1917, the following paragraph appeared in the editorial columns of the *Amrita Bazar Patrika* :—

"There is a mischievous rumour afloat which should be contradicted. It is stated that a vigorous attempt is being made to get up a Bench to consider the appeal on the judgment of Mr. Justice Greaves in connection with the acquisition of surplus land by the Calcutta Improvement Trust according to some body's choice. We do not believe that it is possible for any one, far less the Chairman of the Trust, to secure a Bench after his own heart, as a counterpoise to the Mookerjee and Cuming Bench. We are sure the interest of every rate-payer is safe in the hands of the Hon'ble Judges and we do not think that any official of the Trust can go so far."

Four days later, on the 22nd May, the following paragraph appeared in the editorial columns of the same paper :—

"Something like consternation prevails on account of the proposed new constitution of the Appellate Bench of the Calcutta High Court, before which appeals against the awards of the Improvement Trust are to be heard. It is known to the reader how this

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Bench was originally composed of Sir Asutosh Mookerjee and the Hon'ble Mr. Justice Cuming, and how latterly it has come to be presided over by the Hon'ble the Chief Justice and Mr. Justice Woodroffe. Rumour has it that for purposes of hearing Improvement Trust Appeals, the Bench is going to be strengthened by the appointment of Mr. Justice Chitty. Now, what neither the public nor ourselves can understand is this special arrangement for such a Special Bench. If it is contended that two Hon'ble Judges of the highest Court in the land are not competent to decide in appeal cases in which the Improvement Trust is concerned—a contention, however, which we do not believe the Chief Justice will care to advance—why should there be a Special Bench of three and not a Full Bench of five, on which at least two Indian Judges could find seats? As a matter of fact, as land-owners in Calcutta are mostly Indians, and as Indian Judges are likely to know more of conditions, practices, etc, prevailing here, it is but meet that the Appellate Bench in the present circumstances should be so composed as to associate Indian Judges with their European Colleagues. The withdrawal of Sir Asutosh has given rise to rather unsavoury impressions in the public mind, since this proposed arrangement is to follow close upon the heels of his judgment in the case of *The Improvement Trust v. Chandra Kanta Ghosh* (1). Be that as it may, we have perfect faith in the present Chief Justice and believe that as soon as Sir Lancelot Sanderson understands the public feeling in the matter, His Lordship will either form a Full Bench or at least associate an experienced Indian Judge with himself for the hearing of Improvement Trust Appeals."

On the 30th May, 1917, the Chief Justice, after previous consultation with the other members of the Court, directed the issue of a Rule on Tarit Kanti Biswas (the printer and publisher of the Amrita Bazar Patrika), Moti Lal Ghosh, Golap Lal Ghosh and Pijush Kanti Ghosh, Directors, and Golap Lal Ghose and Mrinal Kanti Ghosh, managers of the company called the Amrita Bazar Patrika Ltd, to show cause why they should not be committed or otherwise dealt with according to law for contempt of Court committed by the publication of the two articles mentioned concerning the High Court and the Chief Justice in his administration thereof. The materials whereon the Rule was issued were contained in two affidavits sworn by the Registrar on the Original Side and the Registrar on the Appellate Side as to the actual publication of the articles in the paper and the position the

(1) (1916) 24 C. L. J. 246.

opposite parties occupied in relation to the paper and the company which were its proprietors. The opposite parties have appeared in Court in person and have been represented by Counsel; three of them Taritkanti Biswas, Pijushkanti Ghosh and Mrinalkanti Ghosh have filed affidavits which will require examination hereafter. On the elaborate arguments addressed to the Court, the following points emerge for consideration, namely first, what is the true meaning of the two articles mentioned; do they constitute contempt of Court: secondly, if the articles constitute contempt of Court, has this Court jurisdiction to punish the offenders summarily, and, should such authority, if any, be exercised in the present instance: thirdly, what is the true nature of the present proceedings; is it civil or criminal in character: and fourthly, have the opposite parties or any of them been proved to be so connected with the publication of the articles as to render them liable to punishment for contempt of Court.

As regards the first question, namely, the true meaning of the two articles set out above, there can, in my opinion, be little room for doubt, notwithstanding the able and ingenious arguments, which have been addressed to us. The obvious course to pursue in a case of this description is to read the offending articles as they stand and to attach to the words used their natural meaning without the assistance of a laborious commentary. The general rule of interpretation cannot be formulated in more precise terms, because objectionable language may take an infinite variety of form; this much is clear that it is incumbent on the Court, in all cases, to consider the general tone of the writing. The meaning and intent are to be determined by a fair interpretation of the language used and are matters of law for the Court as to whether or not they constitute contempt. Disclaimer on the part of the publisher as to any intentional disrespect to the Court is consequently not a sufficient defence, when the purpose and meaning of the writing is obviously of a contrary import. No doubt, if the language is fairly capable of an innocent interpretation, the Court will not be astute to read into it a sinister import. *Legal Remembrancer v. Mati Lal Ghose* (1); *Re Townshend*, (2); *Re Martindale*, (3); *Daw v. Eley* (4). But, if the intent is fairly clear, liability to punishment for contempt of Court cannot be successfully evaded by the use of a transparent artifice. Tested from this point of view, how do these articles stand? The first article makes reference to an alleged rumour which the writer describes as mischievous

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(1) (1913) I. L. R. 41 Cal. 173; 18 C. L. J. 452.

(2) (1906) 22 T. L. R. 341.

(3) (1894) 3 Ch. 200.

(4) (1868) L. R. 7 Eq. 49.



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and worthy of contradiction. The rumour is stated to have been to the effect that a vigorous attempt was being made to get a Bench constituted according to the choice of some body to hear the appeal from the judgment of Mr. Justice Greaves in a suit in connection with the acquisition of surplus land by the Calcutta Improvement Trust. The writer expresses his belief that no official of the Trust far less the Chairman, could go so far as to make an attempt of this character, and that it was not possible for any body to secure a Bench after his own heart as a counterpoise to what is called the Mookerjee and Cuming Bench. The writer concludes with an assurance that the interest of every citizen is safe in the hands of the Judges. If this article had stood by itself, it might perhaps have been argued with seeming plausibility that however much open to reproach on the ground of indiscretion and impropriety the writer had no intention to commit a contempt of Court. But the second article, which is written in a very different tone, shows convincingly the true intent and purpose of the first article. The question, however, was raised before us, whether the two articles should be read together. It was contended, that they should not be so read, as there was nothing to indicate that they had emanated from the same individual. In my opinion the two articles may legitimately be read together to determine their scope and purpose, even though they were proved not to have been written by the same person. They obviously relate to the same topic and were published in the editorial columns of the same newspaper; there was a very brief interval of time between them and the first obviously led up to the second, though not expressly mentioned therein. The first article has, I think, a sinister import, and conveys the insinuation that one of the litigant parties in the appeals about to be heard was endeavouring to have a Bench constituted according to its choice. There is no room for controversy that imputation of this character constitutes a contempt of Court. Contempt by speech or writing may be by scandalising the Court itself or by abusing parties to actions or by prejudicing mankind in favour of or against a party before the cause is heard; as has been said, there is nothing of more pernicious consequence than to prejudice the minds of the public against persons concerned as parties in causes before they are finally heard and thus to attempt to obstruct or interfere with the due course of Justice (*Re St. James Evening Post* (1); *Cann v. Cann* (2); *Re American Exchange* (3); *R. v. Gray* (4); *R. v. Davies* (5); *Mc.Leod v. St. Aubyn* (6). But from

(1) (1742) 2 Atk. 469.

(3) (1889) 58 L. J. Ch. 706.

(5) (1906) 1 K. B. 32.

(2) (1754) 2 Ves. Sn. 520.

(4) (1900) 2 Q. B. 36.

(6) (1899) A. C. 549.

- my point of view, it is really immaterial whether the two articles are considered separately or are regarded as component parts of one aggregate, for even if there were any real doubt as to the purpose of the first, there can be no serious dispute as to the meaning of the second.

The second article when carefully analysed may be resolved into the following propositions:—

(1) That the Appellate Bench of the Calcutta High Court before which appeals against the award of the Improvement are to be heard was originally composed of myself and Mr. Justice Cuming.

(2). That I had been withdrawn from this Bench, and that the withdrawal had given rise to rather unsavoury impression in the public mind, as it followed close upon the heels of the judgment in the case of *The Improvement Trust v. Chandra Kanta Ghose* (1) to which I was a party.

(3). That this Appellate Bench had latterly come to be presided over by the Chief Justice and Mr. Justice Woodroffe.

(4). That there was a rumour that the Appellate Bench so constituted was about to be strengthened by the appointment of Mr. Justice Chitty, and this proposed new constitution of the Appellate Bench had created something like consternation.

(5). That if the Bench was to be composed of more than two Judges, it should consist of not three but five Judges, of whom two at least should be Indian Judges, because land-owners in Calcutta (who were principally affected by the operations of the Calcutta Improvement Trust) were Indians, and Indian Judges were likely to know more of conditions and practices prevailing here than European Judges.

These statements constitute a tissue of falsehoods, and, to my mind, one of the most conspicuous features of this trial is that not only has not even the semblance of an attempt been made to establish the truth of these allegations, it has actually been conceded that they are vitiated by a fundamental error. No Bench composed of myself and Mr. Justice Cuming had, at any time, been constituted to hear appeals against what are inaccurately termed the awards of the Improvement Trust. The plain truth is that last year, when Mr. Justice Cuming and myself were in charge of the Bench which had to take cases of what is called the First Group of the Districts, the appeal of the Calcutta Improvement Trust against Chandra Kanta Ghosh came up before us, inasmuch as the appeal had been preferred from the decision of a Subordinate Judge of the 24 Perganahs. The appeal belonged to our Group, was heard by us in due

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course, and was dismissed. We had at no time been constituted a Special Bench to hear appeals in all cases in which the Improvement Trust was concerned, and there is no foundation whatever for the first proposition that the Appellate Bench, before which appeals against the awards of the Improvement Trust were to be heard, was originally composed of myself and Mr. Justice Cuming. Consequently, the suggestion contained in the second proposition that I had been withdrawn from the Appellate Bench, which, in fact, had never been constituted, is equally groundless. Here I may observe that as under section 108, sub-section 2 of the Government of India Act, 1915, the duty devolves upon the Chief Justice to determine, from time to time, what Judges of the Court are to constitute the several Division Courts, the second proposition necessarily involves an imputation against the Chief Justice that he had withdrawn me from the Appellate Bench he had previously constituted, composed of myself and Mr. Justice Cuming to hear appeals in cases in which the Calcutta Improvement Trust was concerned. There is clearly the further imputation that the Chief Justice had taken this action by reason of my judgment in the appeal preferred by the Improvement Trust against Chandra Kanta Ghosh. As the Appellate Bench had never in fact been constituted in the manner stated by the writer, the charge that I had been withdrawn therefrom for the reason assigned was evidently baseless. The third proposition, namely, that the Appellate Bench had been constituted of the Chief Justice himself and Mr. Justice Woodroffe, in supersession of the previously constituted Bench composed of myself and Mr. Justice Cuming was consequently equally unfounded; as a matter of fact long before the constitution of the Bench to hear the appeals from the original side, Mr. Justice Cuming had ceased to be a member of this Court. The fourth proposition refers to the rumour that the Appellate Bench presided over by the Chief Justice and Mr. Justice Woodroffe was about to be strengthened by the appointment of Mr. Justice Chitty, and that something like consternation prevailed on account of the proposed new constitution of the Bench. As I read the article, the consternation was due, not so much to the fact that the Chief Justice and Mr. Justice Woodroffe composed the Bench, as to the fact that the Bench was about to be strengthened by the appointment of Mr. Justice Chitty. This implies most unmistakably that a just decision that is a decision just in the estimate of this impartial writer could not be expected from a Bench so constituted. If language has any meaning, this was clearly a libel on Mr. Justice Chitty, if not also upon the other two members of the

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Bench. The fifth proposition involves a libel upon Indian Judges, but in the opposite direction. No doubt, it is very artfully suggested that Indian Judges should be on the Bench to hear this class of cases, because they are likely to know more of conditions and practices prevailing here than European Judges. But, as was well known, the matter in controversy in the appeals had not the remotest connection with a knowledge of local conditions and practices. The point in issue was a dry question of law as to the true interpretation of a legislative enactment. The writer, however, unmistakably insinuates that land-owners in Calcutta (who are principally affected by the operations of the Trust) are mostly Indians, and Indian Judges on the Bench might be expected to give a decision in their favour. I do not appreciate the distinction between an insinuation that a European Judge is likely to decide in favour of the executive, because he is a European, and an insinuation that an Indian Judge is likely to decide in favour of Indian land-owners, because he is an Indian. To my mind, the two statements are, equally reprehensible as libels on the Judges of this Court. I cannot, in this connection, pass by in silence the observations of Mr. Jackson as to the constitution of the Bench which actually heard the appeals from the judgment of Mr. Justice Greaves. The Court is called upon, in the present Rule, to consider the true character of the allegations contained in the two articles published in the Amrita Bazar Patrika, and to determine whether they do or do not constitute a contempt of Court. We have no concern whatever with the question, whether the Chief Justice, who alone is charged with the duty to constitute Division Courts has in this particular instance exercised wisely or otherwise the discretion vested in him by law. The remarks of Mr. Jackson on this subject were absolutely irrelevant for the determination of the question before the Court, and exhibited, I feel constrained with regret to hold, an unusual and unwarranted lapse from that decorum which we are accustomed to associate with the transaction of public business in a Court of Justice. I cannot but deem it significant that the other counsel engaged in the case expressly dissociated themselves with special care from the comments made by Mr. Jackson in this behalf. Here I may observe that in the judgment just delivered by the Chief Justice, he has taken pains to explain the reasons which moved him to constitute the Bench as he did; Mr. Justice Woodroffe also has touched on the subject and expressed his opinion thereon. But for obvious reasons, which need not be dilated upon, I must respectfully decline to examine the question. Besides, the exercise of discretion by the Chief Justice in the matter

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of constitution of a Division Court to hear the appeals against the judgment of Mr. Justice Greaves, is, under the law, not liable to be reviewed by this Bench and is not subject to our approbation or disapprobation. I desire consequently, to guard myself most carefully from the discussion of a question which, notwithstanding what fell from Mr. Jackson, does not, in my judgment, properly arise even as a side-issue in these proceedings; such a discussion is not likely to advance any useful purpose because it cannot be of real assistance in the solution of the very narrow issue comprised in the scope of our enquiry, namely, the real import of the two articles published in the Amrita Bazar Patrika and whether, on a fair interpretation, they did or did not constitute a contempt of this Court; upon that matter, which alone it is our function to decide, I feel no reasonable doubt. I desire, however, to repudiate most emphatically the astonishing assertion made by Mr. Jackson that landless Judges as he called them, were, merely because they were landless, less competent and less trustworthy as interpreters of a statutory enactment than Judges of any other class, and that Indian Judges, because they might possibly be proprietors of land were for this purpose more capable and reliable as expounders of the law than their European colleagues. But to return to the two articles it seems to me indisputably plain that the implication of the second article whether taken along with or independently of the first, is that, at the instance of persons interested in the Calcutta Improvement Trust, the Chief Justice has constituted a Special Bench to ensure a decision favourable to the Trust in the appeals against the judgment of Mr. Justice Greaves. This brings me to the question which is the crux of the whole matter, namely, whether an imputation of this character constitutes a contempt of Court.

It is not necessary for our present purpose to give an exhaustive enumeration of acts which amount to contempts of Court. It is sufficient to state that scandalous attacks upon Judges calculated to cause an obstruction to public justice, do constitute such contempts. Blackstone, in a celebrated passage of his commentaries (Vol. IV page 285) which will be found quoted in *Legal Remembrancer v. Matilal Ghose* (1), specifies, in his description of contempts of Court, contempts which arise "by speaking or writing contemptuously of the Court or Judges, acting in their judicial capacity and which demonstrate a gross want of that regard and respect, which when once Courts of Justice are deprived of, their authority, so necessary for the good order of the Kingdom, is entirely lost amongst the people."

(1) (1913) I. L. R. 41 Calc. 173 (255); 18 C. L. J. 452.

Sir John Wilmot C. J. in *R. v. Almon* (1), justifies a similar view in a passage which may be usefully recalled here :

“By our constitution, the King is the fountain of every species of justice, which is administered in this kingdom. The King is *de jure* to distribute justice to all his subjects ; and, because he cannot do it himself to all persons, he delegates his power to his Judges, who have the custody and guard of the King’s oath, and sit in the seat of the King ‘concerning his justice.’ The arraignment of the justice of the Judges, is arraigning the King’s Justice ; it is an impeachment of his wisdom and goodness in the choice of his Judges, and excites in the minds of the people a general dissatisfaction with all judicial determination, and indisposes their minds to obey them ; and whenever men’s allegiance to the laws is so fundamentally shaken, it is the most vital and most dangerous obstruction of justice, and, in my opinion, calls out for a more rapid and immediate redress than any other obstruction whatsoever ; not for the sake of the Judges, as private individuals, but because they are the channels by which the King’s justice is conveyed to the people. To be impartial, and to be universally thought so, are both absolutely necessary for giving justice that free, open and uninterrupted current, which it has, for many ages, found all over this Kingdom, and which so eminently distinguishes and exalts it above all nations upon the earth.” It is needless to multiply early instances of the application of this doctrine, which will be found collected in 3 Howell State Trials, 1074-1080, and 8 Howell State Trials, 50. Amongst modern instances reference may be made to the observations in *Re Bahama Islands* (2) ; *R. v. Staffordshire County Court Judge* (3) ; *R. v. Dray* (4) ; *R. v. Davies* (5) ; *Surendra Nath Banerjee v. Chief Justice of Bengal* (6) ; *Re Sarbadhicary* (7) ; *Re William Tayler* (8), and *Re Banks and Fenwick* (9). The principle deducible from these cases is that punishment is inflicted for attacks of this character upon Judges, not with a view to protect either the Court as a whole or the individual Judges of the Court from a repetition of the attack, but with a view to protect the public, and specially those who, either voluntarily or by compulsion, are subject to the jurisdiction of the Court, from the mischief they will incur, if the authority of the

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(1) (1765) Wilmot 243 (255).

(2) (1893) App. Cas. 138 (148).

(3), (1838) 57 L. J. Q. B. 483.

(4) (1900) 2 Q. B. 36 (40).

(5) (1906) 1 K. B. 32 (40).

(6) (1883) L. R. 10 I. A. 171 ; I. L. R. 10 Calc. 109.

(7) (1906) L. R. 34 I. A. 41 ; I. L. R. 29 All 95.

(8) (1869) 25 C. L. J. 345.

(9) (1869) 26 C. L. J. 491.

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tribunal be undermined or impaired. The contention has been advanced, however, that if this be the true reason for the rule, it is necessary to establish, as a matter of fact, that the actual effect of the publication has been an obstruction to public justice, and, that, in the absence of such proof, it cannot be held that there has been a contempt of Court. In support of this position, reliance has been placed upon the decisions in *R. v. Freeman's Journal* (1) and *R. v. Dolan* (2). The cases mentioned do not support this proposition, which is, on the other hand, negatived by the decisions in *R. v. Gray* (3); *Hunt v. Clarke* (4); *Re Pall Mall Gazette* (5); *Grimwade v. Cheque Bank* (6); these show that a contempt of Court is committed by libellous attacks on a Judge for what he did judicially, if such attacks are likely, or tend in any way, to interfere with the due administration of justice. As Elliott J. well puts it in *Peole v. Stapleton* (7) it would be as reasonable to require proof of actual hinderance in the administration of justice by reason of a libellous attack on a Judge in his judicial capacity, as for a person who has made a violent assault on another to plead that he has committed no offence because he has not succeeded to overcome his victim. It is not only important that the trial of causes shall be impartial and that the decisions of the Courts shall be just; it is equally important that causes shall be tried and judgments rendered without bias, prejudice or improper influence of any kind. He who scandalises the Court or a Judge in relation to a particular litigation, commits an offence, not merely against the rights of those litigants, but also against public justice: *Re Bahama Islands* (8) It is a public wrong, a crime against the State, to undertake, by libel or slander on the Judges, to impair confidence in the administration of justice. That a party indulges in calumny of the gravest character, and, consequently, does not succeed in his endeavour to shake the confidence of the public in the Court, surely does not alter the quality of his act or make it any the less reprehensible. From this standpoint, it is immaterial whether the attack on the Judge is with reference to a cause about to be tried, or actually under trial, or recently adjudged; in each instance, the tendency is to poison the fountain of justice, to create distrust, and to destroy the confidence of the people in the Courts, which are of prime importance to them in the protection

(1) (1902) 2 I. R. 82.

(2) (1907) 2 I. R. 260.

(3) (1900) 2 Q. B. 36.

(4) (1889) 58 L. J. Q. B. 490 (492); 37 W. R. 724

(5) (1894) 11 T. L. R. 122.

(6) (1897) 13 T. L. R. 305.

(7) (1893) 18 Colorado 568; 23 I. R. A. 787; 33 Pacific 167.

(8) (1893) App. Cas. 138 (148).

of their rights and liberties : *R. v. Gray*. (1). Upon my construction of the second article, read with or without reference to the first, I hold that it undoubtedly constitutes a contempt of Court.

As regards the second question, there is no room for controversy that this Court has power to punish summarily a contempt of Court committed by the publication of a libel on the Court or on the Judges, when the Court is not sitting. By clause 1 of the Letters Patent of 1862 and clause 2 of the Letters Patent of 1865, the Court was constituted as a Court of Record ; and, as a superior Court of Record, it has summary jurisdiction to punish for contempt of Court. This was affirmed in respect of the Superior Courts at Westminster by Wilmot C. J. in *R. v. Almon* (2) and his opinion has been quoted with approval in a long line of decisions, the most notable whereof is, perhaps, the judgment of Cockburn C. J. in *R. v. Lefroy*. (3) Mr. Jackson contended that this view will not stand scrutiny and may properly be described as "law taken for granted." In this connection, he invited our attention to a celebrated passage from the judgment of Lord Denman L. C. J. in *R. v. O'Connell* (4) "A large portion of that legal opinion, which has passed current for law falls within the description of 'law taken for granted ;' if a statistical table of legal propositions were drawn out, and the first column were headed "law by statute," and the second, "law by decision," a third column under the heading of "law taken for granted, would comprise as much matter as both the others combined. But when in pursuit of truth we are obliged to investigate the grounds of the law, it is plain, and has often been proved by recent experience, that the mere statement and restatement of a doctrine, the mere repetition of the cantilena of lawyers, cannot make it law unless it can be traced to some competent authority, and if it be irreconcilable to some clear legal principle." But the question remains, whether the proposition that a superior Court of Record has power to punish summarily for contempt of Court, can appropriately be treated as "law taken for granted." I am not unmindful that a learned writer (Mr. John Charles Fox in the Law Quarterly Review Vol. XXIV, 184, 266) has maintained the view that the opinion expressed by Wilmot C. J. in *R. v. Almon* (2), is not historically accurate. Let us assume that this criticism is well-established on the ancient authorities and that while originally the superior Courts of Common Law had jurisdic-

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(1) (1900) 2 Q. B. 36.

(2) (1765) Wilmot 243 (254).

(3) (1873) L. R. 8 Q. B. 114 (137).

(4) (1844) 5 St. Tr. (N. S.) 1 (877) ; 11 Cl. & F. 155 (373) ; 65 R. R. 59 (181) ; 1 Cox. 413.



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tion to punish only disobedience to the King's writ summarily by fine and imprisonment upon attachment, they had jurisdiction only on indictment or bill to punish contempts *in facie* and other obstructions to the Administration of justice, such as libelling the Court or the Judge. Let us assume also that the development of the summary jurisdiction to punish contempts has been of slow growth and that the earliest recorded case of libel or slander on the Court or a Judge by a stranger unconnected with the service of process, which was punished summarily by attachment, cannot be traced to a period anterior to 1720. Surely, this cannot but be regarded now as a matter of other than antiquarian interest. We have abundant "competent authority" "not irreconcilable to clear legal principle," in support of the view, that a Superior Court of Record does possess the power to punish summarily contempts of Court of the description now before us. Sir Barnes Peacock C. J. maintained and applied this principle in *Re Abdul and Mahtab* (1) and *Re William Tayler* (2); which, upon a full review of the authorities was reaffirmed in *Legal Remembrancer v. Matilal Ghose* (3). We have also the pronouncement of the Judicial Committee to the same effect in *McDermott v. Judges of British Guiana* (4), where they confirmed the view indicated in the earlier cases of *Smith v. Justice of Sierra Leone* (5), and *Rainy v. Justices of Sierra Leone* (6). As regards the power of Indian High Courts in a case of this character, we have two decisions by the Judicial Committee, namely, *Surendra Nath Banerjee v. Bengal High Court* (7), and *Re Sarbadhicary* (8). In the former case it was ruled that the High Court had power to punish in a summary manner, by fine or imprisonment or both, a contempt of Court, which, in that case, as in the present, consisted in the publication out of Court of a libel on one or more of the Judges. In the latter case, the Judicial Committee held that there was no doubt that the publication of the libel in question constituted a contempt of Court, which might have been dealt with by the High Court in a summary manner, by fine or imprisonment or both. In my opinion, these repeated pronouncements by the Judicial Committee conclude the matter, so far as "competent authority" is concerned, and no useful purpose can be served by an examination of the historical basis of

(1) (1867) 8 W. R. Cr. 32.

(2) (1869) 26 C. L. J. 345.

(3) (1913) I. L. R. 41 Calc. 173 (243); 18 C. L. J. 452.

(4) (1868) L. R. 2 P. C. 341.

(5) (1841) 3 Moo. P. C. 361.

(6) (1852-53) 8 Moo. P. C. 47.

(7) (1883) L. R. 10 I. A. 171.

(8) (1906) L. R. 34 I. A. 41.

the opinion expressed by Wilmot C. J. That the possession of this power by a Judicial tribunal (however cautiously and sparingly it may have to be exercised) is not also "irreconcilable to clear legal principle" is beyond serious controversy; indeed, the summary power to commit and punish for contempts tending to obstruct or degrade the administration of justice, is essential to the preservation of order in judicial proceedings, to the maintenance of the authority of a Court and to the enforcement of its judgments; it is a necessary incident and attribute of a superior Court, without which it could no more exist than without a Judge. (See the cases reviewed in *Legal Remembrancer v. Matilal Ghose* (1). It was argued, however, on the authority of the decision of the Judicial Committee in *McLeod v. St. Aubyn* (2), that committals for contempt of Court by scandalising the Court itself had become obsolete in England. It may be observed here parenthetically that this very decision of the Judicial Committee is an authority for the proposition that, as laid down by Lord Hardwicke in *Re St. James Evening Post* (3) the publication of scandalous matter in respect of the Court itself is a contempt and that power summarily to commit for contempt of Court is considered necessary for the proper administration of justice. I do not read the statement, that committals for contempt of Court by scandalising the Court itself had become obsolete in England, as destructive of the authority of the earlier decisions on the subject. Indeed, the proposition taken literally seems to go too far and it is significant that, in the very next year, proceedings were taken in England for contempt of Court in the case of *R. v. Gray* (4). There can, I think, be no doubt that where the circumstances clearly demand action of this description, the Court will not hesitate to exercise its undoubted power to punish on summary process the contempt of scandalising it and thereby attempting to interfere with the due course of justice. No doubt, as Lord Morris observes in *McLeod v. St. Aubyn* (2), Courts may be satisfied sometimes to leave to public opinion attacks or comments derogatory or scandalous to them. But I do not accede to the argument that it is invariably prudent for the Court to assume an attitude of indifference or to institute regular criminal proceedings against the offender. In this connection, reference may appropriately be made to the weighty words of Kent C. J. in *Yates v. Lansing* (5); "Whenever we subject the established Courts of the land to the

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(1) (1913) I. L. R. 41 Calc. 173 (245); 18 C. L. J. 452.

(2) (1899) A. C. 549 (561).

(3) (1742) 2 Atkyns 469 (471).

(4) (1900) 2 Q. B. 36.

(5) (1810) 5 Johnson 282.

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degradation of private prosecution, we subdue their importance and destroy their authority. Instead of being venerable before the public, they become contemptible; and we thereby embolden the licentious to trample upon everything sacred in society and to overthrow those institutions which have hitherto been deemed the best guardians of civil liberty." (See also the very pertinent observations of Marshall J. in *State v. Shepherd* (1), quoted in *Legal Remembrancer v. Matilal Ghose* (2). In my opinion this Court has undoubted jurisdiction to deal summarily with persons who have committed contempt by scandalous attack upon the Judges, and such power should be exercised in the present instance. When I hold this, I do not overlook the assertion of the printer and publisher that the articles before us were published by him in good faith and in the public interest. The sincerity of this plea appears to me to be open to the gravest doubt. But, even on the assumption that this allegation is literally true, I desire to add that, while I do not under-rate in the least degree the importance of the liberty of the press, I cannot hold it expedient that any class of the community should be privileged to attack the Courts so as to interfere with the rights of litigants or to embarrass the administration of justice. The publishers of newspapers have the right, but no higher right than others to bring to public notice the conduct of Courts, and *provided the publications are true and fair in spirit*, there is no law to restrain the freest expression of the disapprobation that any person may entertain of what is done in or by the Courts. But liberty of the press must not be confounded with license or abuse of that liberty, and though it may be true that where the liberty of the press and freedom of public comments end, there tyranny begins, it is at least equally true that where vituperation begins, there the liberty of the press ends; and the inherent power of the superior Courts of Record to punish any publication calculated to interfere with the Administration of Justice cannot be deemed in any way restricted by consideration of the kind urged by the Printer and Publisher.

As regards the third question, namely what is the true nature of the present proceedings, is it civil or criminal in character, the matter is of practical importance from the point of view of the mode of trial to be adopted. In the case of *Legal Remembrancer v. Mati Lal Ghose* (2) I had occasion to examine fully the distinction between a criminal and a civil contempt, which is of a fundamental character.

(1) (1900) 113 Geo. 114; 15 L. R. A. 225.

(2) (1913) I. L. R. 41 Calc. 173 (246, 252); 18 C. L. J. 254.

A criminal contempt is conduct that is directed against the dignity and authority of the Court. A civil contempt, on the other hand, is failure to do something ordered to be done by a Court in a civil action for the benefit of the opposing party therein. Consequently, in the case of a criminal contempt the proceeding is for punishment of an act committed against the majesty of the law, and, as the primary purpose of the punishment is the vindication of the public authority, the proceeding conforms, as nearly as possible, to proceedings in criminal cases. In the case of a civil contempt on the other hand, the proceeding in its initial stages at least, when the purpose is merely to secure compliance with a judicial order made for the benefit of a litigant, may be deemed instituted at the instance of the party interested and thus to possess a civil character. But, here also refusal to obey the order of the Court may render it necessary for the Court to adopt punitive measures against the person who has defied its authority: at that stage, at least, the proceedings may assume a criminal character. In this manner, the dividing line between acts which constitute criminal and others which constitute civil contempts may become indistinct in those cases, where the two gradually merge into each other: See *Re St. James Evening Post* (1); *Scott v. Scott* (2); *Charlton's Case* (3); *In re Wallace* (4); *In re Davies* (5); *Onslow's Case* (6); *Skipworth's Case* (7). A careful scrutiny of the cases in the books shows, however, that much confusion exists in the reported decisions as to whether or not contempt proceedings are civil or criminal, where the contempt is committed in relation to a civil proceeding, and, it is consequently desirable to investigate briefly the true test for differentiation.

The power to punish for contempt is inherent in the very nature and purpose of Courts of justice. It subserves at once a double purpose, namely as an aid to protect the dignity and authority of the tribunal and also as an aid in the enforcement of civil remedies. The power may consequently be exercised in civil or criminal cases or independently of both, and either solely for the preservation of the authority of the Court or in aid of the rights of the litigant or for both these purposes combined. By reason of this two-fold attribute, proceedings in contempt may be regarded as anomalous in their nature, possessed of characteristics which render them more or less difficult of ready or definite classification in the realm of judicial

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(1) (1742) 2 Atkyns 469; 26 E. R. 633

(2) (1913) A. C. 417.

(3) (1838) 2 My & Cr. 316.

(4) (1866) L. R. 1 P. C. 283.

(5) (1888) 21 Q. B. D. 236.

(6) (1873) L. R. 9 Q. B. 219.

(7) (1873) L. R. 9 Q. B. 230.

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power. Hence, such proceedings have sometimes been styled *sui generis*. That they are largely of a criminal nature, inasmuch as the Court has power to convict and punish for the wrong committed, cannot be disputed, and yet it must be recognised that, in some respects, by reason of the end subserved, they partake of the nature of a civil remedy. This dual characteristic has given rise to many controversies, specially when questions have arisen as to right of appeal from the order passed, as in *R. v. Barnardo* (1), *Barnardo v. Ford* (2), *Helmores v. Smith* (3), *A. G. v. Kissance* (4), *Hunt v. Clark* (5), *R. v. Staffordshire* (6), *O'shea v. O'shea* (7), *Bessette v. Conkey Co.* (8), *Re Christensen Engineering Co.* (9), *Warden v. Searls* (10), *Gompers v. Buck's Stove Co* (11)] the applicability of rules of evidence, [*Celluloid Co. v. Chrolithian Co.* (12), *Bullock Co. v. Westinghouse Co* (13), *Exp. Gould* (14)] the finality of the judgment [*Fischer v. Hayes* (15), *Re Mullee* (16)] liability for payment of costs, [*Re Cornish* (17), *Re Martindale* (18), *Day v. Longhurst* (19)] right of trial by jury, [*Tinsley v. Anderson* (20), *Re Debs* (21), *Eilenbecker v. Plymouth Court* (22)] and other like matters. The difficulty in each case is to determine when a particular proceeding assumes the criminal rather than the civil aspect, or when of both, and, if the latter, which feature must control. The question has been repeatedly and elaborately discussed by the Supreme Court of the United States. *Ex. Kearney* (23), *New Orleans v. Steamship Co.* (24), *In re Chiles* (25), *Hayes v. Fischer* (26), *Warden v. Searls* (10), *Ex. Debs* (21), *O'Neal v. U. S.* (27), *In re Christensen Engineering Co.* (9), *Bessette v. Conkey Co.* (8), *Doyle v. London Guarantee Co.* (28), *Gompers v. Buck's Stove Co.* (11). The

(1) (1889) 23 Q. B. D. 305.

(2) (1892) A. C. 326.

(3) (1886) 35 Ch. D. 449.

(4) (1893) 32 L. R. Ir. 220.

(5) (1889) 58 L. J. Q. B. 490.

(6) (1888) 57 L. J. Q. B. 483.

(7) (1890) 15 P. D. 59.

(8) (1904) 194 U. S. 324.

(9) (1904) 194 U. S. 458.

(10) (1886) 121 U. S. 14.

(11) (1911) 221 U. S. 418.

(12) (1885) 24 Fed. 585.

(13) (1904) 63 C. C. A. 607 ; 194 U. S. 636.

(14) (1893) 99 Cal. 360 ; 21 L. R. A. 751 ; 37 Am. St. Rep. 57.

(15) (1881) 19 Blatch 13 ; C. Fed. 63.

(16) (1869) 7 Blatch, 23 ; 17 Fed. Cas. 9911.

(17) (1893) 9 T. L. R. 196.

(18) (1894) 3 Ch. 193.

(19) (1892-3) 62 L. J. C. 334.

(20) (1898) 171 U. S. 101.

(21) (1894) 158 U. S. 564.

(22) 1889) 134 U. S. 31.

(23) (1822) 7 Wheaton 38.

(24) (1874) 20 Wallace. 387.

(25) (1874) 22 Wal. 157.

(26) (1880) 102 U. S. 121.

(27) (1903) 190 U. S. 36.

(28) (1907) 204 U. S. 599.

view deducible from these decisions is in general agreement with what is indicated above, namely, a proceeding to punish for contempt has the essential qualities of a criminal proceeding, whether the proceeding is initiated primarily to vindicate the Court's authority or solely as a coercive and a remedial measure to enforce the rights of the litigant or for both these purposes combined. This must be so, since it necessarily results from the nature of the power to punish for contempt that whatever the primary purpose of such a proceeding may be, it is always within the power of the Court to make its judgment, in part, at least, punitive or vindictory in character : in other words, where the sole purpose sought by initiating the proceeding is to secure the coercive and remedial action of the Court against a party, the Court may, nevertheless in its discretion, add a punishment, by way of fine or imprisonment, for the failure of the person in contempt to obey its mandate. I think it undeniable that the proceeding must be regarded from its inception to the point of judgment as of a criminal nature, or, at least potentially so, since until the judgment is given, it cannot be known what its character will be. It is the judgment, therefore, which must eventually in any case determine the character of the proceeding, and this leads to the conclusion that logically, perhaps, instead of characterising contempt proceedings as criminal or remedial according to circumstances, it is contempt judgments that should be so classified. In any view, there is no room for controversy that where, as here, the contempt consists in an attack upon the Court, the proceedings, instituted to vindicate its dignity, are of criminal nature, even though the attack has been made in connection with civil suits or appeals, either actually decided or pending or about to be taken up for disposal : (*Legal Remembrancer v. Mati Lal Ghose* (1).

As regards the fourth question, we have to consider separately the liability of each of the five persons who have been called upon to show cause why they should not be committed for contempt of Court. Tarit Kanti Biswas has filed an affidavit to the effect that he is the printer and publisher of the Amrita Bazar Patrika and that in such capacity he printed and published the articles mentioned. He states, however, that he exercises no control whatever over the contents of the newspaper, that he did not read the articles when they were handed over to him for publication, that he did not consider at any time prior to publication, their meaning or purport, that he inserted them in the paper in the usual course of business, that he acted *bonafide* and was not actuated by a disrespectful or

(1913) I. L. R. 41 Calc. 173 ; 18 C. L. J. 452.

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other improper feeling or motives towards the Court or the Chief Justice, and that he did not intend to excite contempt or to reflect in any way upon the integrity or dignity of the Court or of the Chief Justice in his administration thereof. Notwithstanding this defence, there can be no doubt as to the liability of the printer and publisher; for as Lord Morris observed in *McLeod v. St. Aubyn* (1), a printer and publisher intends to publish and so intending cannot plead as a justification that he did not know the contents. Indeed, this has been the settled law ever since the decision of Lord Hardwicke in *Re St. James's Evening Post* (2), which was followed by Lord Erskine in *Ex Jones* (3), and by Stirling, J. in *Re American Exchange in Europe* (4), *Cheshire v. Straus* (5), *R. v. Parke* (6), *Emmens v. Pottle & others* (7), *R. v. Davies* (8), *Daw v. Eley* (9), *Tichborne v. Tichborne* (10), *Re Cheltenham Carriage Co.* (11), *Littler v. Thomson* (12). The Rule must consequently be made absolute against the printer and publisher. With regard to his allegation that he had no intention whatever to offend the dignity or integrity of the Court and that in reality he was helpless in the position he occupied as a servant of the Company, one cannot but feel that the value of such assurance is considerably discounted by the fact that he has given no information to the Court. I am not unmindful that as ruled in *Re Bahama Islands* (13), he was under no legal obligation to assist the Court in any way, and to disclose the name of the person primarily responsible for the articles, still his conduct serves to throw doubt in a considerable measure on the genuineness of his profession that he had no intention to prejudice the due course of administration of justice or to cast any reflection on the Judges of this Court. He must accordingly take the consequences of his act, and cannot reasonably urge that he has established a claim for specially considerate treatment. See the observations of Stirling J. in *Re American Exchange in Europe* (4).

As regards the other four defendants, it is necessary to state that they have not all taken up the same attitude in this matter. Counsel on behalf of Mati Lal Ghosh declined to answer, as he was entitled to do, the question put by me, whether he was in reality one of the Directors of the Company as stated in the return of Golap Lal Ghosh

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|-----------------------------------|--------------------------------------------|
| (1) (1809) A. C. 549 (562).       | (2) (1742) 2 Atkyns 469.                   |
| (3) (1806) 13 Ves. 237 (230).     | (4) (1889) 58 L. J. Ch. 706.               |
| (5) (1896) 12 T. L. R. 291.       | (6) (1903) 2 K. B. 432.                    |
| (7) (1885) 16 Q. B. D. 354 (357). | (8) (1906) 1 K. B. 32.                     |
| (9) (1868) L. R. 7 Eq. 49.        | (10) (1867) L. R. 7 Eq. 55; 15 W. R. 1073. |
| (11) (1869) L. R. 8 Eq. 530.      | (12) (1839) 2 Beav. 129.                   |
| (13) (1893) A. C. 138 (149).      |                                            |

alleged to have been filed under section 32 of the Indian Companies Act 1913. Pijush Kanti Ghosh has filed an affidavit in which he admits that he is one of the directors of the Company, but that neither he nor his co-directors exercise any control over the contents of the newspaper and perform such duties and exercise such powers only as are mentioned and defined in the Article of Association. He further alleges that he was absent from Calcutta from the 21st May to the 4th June and was not here on the date when the second article appeared. Mrinal Kanti Ghosh has filed a similar affidavit, in which he admits that he is the Secretary of the Company. He further alleges that Moti Lal Ghosh, Gopal Lal Ghosh and Pijush Kanti Ghosh are Directors of the Company, that Golap Lal Ghosh is also the financial manager, that neither he nor the Directors nor the financial manager exercises any control whatever over the contents of the paper and that the Directors perform such duties and exercise such powers only as are mentioned and defined in the Articles of Association (extracts wherefrom are appended to the affidavit). He enumerates also the duties of the Secretary and of the financial manager, and finally adds that he was absent from Calcutta from the 4th May to the 22nd May and was not here on either of the two dates when the articles mentioned appeared. Golap Lal Ghosh has not filed any affidavit, and on his behalf, Counsel has contended that there is no legal evidence whatever to connect him in any way with the publication of either article. This argument is based on three grounds, namely, *first*, that secondary evidence of the return alleged to have been filed under section 32 of the Indian Companies Act was not admissible; *secondly*, that even if secondary evidence were held admissible, evidence was requisite to prove that the original had been filed by Golap Lal Ghosh who is Director and financial manager of the Company and has been called upon to show cause; and *thirdly*, assuming but not admitting that he was a manager on the 5th March, 1917, as stated in the return, there is no evidence that he was manager on either of the dates when the offending articles were published.

Before I deal with these objections and their effect upon the Rule, I may make the preliminary observation that the materials which were placed before the Court when the Rule was issued amply justified the action then taken, indeed, made it in a manner incumbent upon the Court to follow the course actually adopted. These materials showed that the Amrita Bazar Patrika was the property of a Company called the Amrita Bazar Patrika Limited, incorporated under the Indian Companies Act, 1882 on the 19th

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November 1908 : that one of the objects for which the Company was established was to acquire and take over as a going concern the business of newspaper proprietors, printers and publishers then carried on in connection with the paper : that the registered office of the Company was at 2 Ananda Chatterjee's Lane where the newspaper was published, and where many of the Shareholders and Directors who were closely related to each other lived, and that on the 5th March 1917, the Directors and Managers were the persons mentioned in the return filed by the Secretary under the provisions of the Indian Companies Act. In these circumstances, there was a strong *prima facie* case against the defendants that they were connected with and responsible for the publication of the articles in question. But although these materials were sufficient to justify the issue of a Rule, on careful scrutiny and on examination of the allegations in the affidavits filed in answer to the Rule, I see no escape from the conclusion that an order cannot properly be made against any of the defendants other than the printer and publisher.

With reference to the legal objections just enumerated, I am not prepared to accede to the contention that secondary evidence of the returns in the custody of the Registrar of Joint Stock Companies, is not admissible. Sec 65 Clause (e) of the Indian Evidence Act provides that secondary evidence may be given of the contents of a document when the original is a public document within the meaning of Sec 74. Section 74 sub-section 2 provides that public records kept in British India of private documents are public documents. The question consequently reduces to this whether the returns in the custody of the Registrar of Joint Stock Companies constitute public records of private documents. The observation of Lord Blackburn in *Sturla v. Freccia* (1) is of no assistance in the solution of this question and does not show that a public record of a private document is limited to an entry made in a book by a public officer, which reproduces the contents of the document and thus constitutes a written memorial made by the public officer authorised by law to perform that function. The term "record" as appears from the Oxford Dictionary (Vol. VIII, 266) has a more comprehensive meaning and includes a collection of documents. When, as in the case of the Indian Companies Act, the legislature has provided that returns are to be lodged with a public officer, these returns, when transmitted to and filed by him, do constitute public

(1) (1880) 5 A. C. 623 (642).

records of private documents within the meaning of Sec. 74, sub-section 2, although they are not copied out by the Registrar of Joint Stock Companies into a volume kept for the purpose; they are undoubtedly intended for reference and used by the public. But though this objection is of no avail, the second exception is well-founded; for although secondary evidence may be admissible, the party who produces the evidence is not relieved of his obligation to prove the execution of the document, just as if the original had been produced, unless the case is covered by Sec. 90 of the Indian Evidence Act or the legislature has expressly provided that the document or endorsement thereon is receivable in evidence without proof of execution, as, for example, in section 60 of the Indian Registration Act. Consequently, as against Moti Lal Ghose and Golap Lal Ghosh, there is no legal evidence to establish that the former is a Director and the latter a Manager of the Company. The statements made by Pijush Kanti Ghosh and Mrinal Kanti Ghosh in the affidavits filed by them at the hearing, cannot fairly be used to the detriment of other defendants as the proceeding is in the nature of a criminal trial. Besides, as pointed out in the case of *Legal Remembrancer v Mati Lal Ghose* (1) on the authority of the decision in *R. v. Stanger* (2), supplementary evidence cannot be given so as to prejudice the position of the accused. To the same effect are the observations made by Wright, J., in *Re Hooley* (3) when he was asked to grant leave to amend a notice of motion to commit a company for contempt of Court. "That is not the way in which the Court deals with matter of this kind affecting the liberty of the subject. Applicants must come with their machinery ready". The procedure should be at least equally strict and adherence to the forms of the law at least equally scrupulous, when the Court finds itself in the position of Prosecutor and Judge and an unexpected lacuna in the evidence transpires during the trial. The Court must act with great caution in strict conformity with the requirements of the law and avoid a perhaps not unnatural tendency to supplement the evidence. [*Martin v. Mackonochie*, (4)]. As regards the third legal objection, however, I am not convinced that there is any substance in the argument. Section 87 of the Indian Companies Act requires that notice of changes among the Directors or Managers shall be filed from time to time. The certified copy of the return furnished by the Registrar of Joint Stock Companies must therefore be

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(1) (1913) I. L. R. 41 Calc. 173 (178, 198); 18 C. L. J. 452.

(2) (1871) L. R. 6 Q. B. 352.

(3) (1899) 6 Manson 44 (46).

(4) (1878) 3 Q. B. D. 730 (775).

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presumed to embody the latest changes. Consequently, if the return had been duly proved, it would have furnished *prima facie* evidence of the names of the Directors and Managers on the day the copy was supplied. But this point is immaterial, as, in my opinion, there is no legal evidence to connect Moti Lal Gosh and Golap Lal Ghosh with the publication of the articles.

There remains for examination the cases of Mrinal Kanti Ghosh and Pijush Kanti Ghosh, who admit that they are Directors. But they assert in their respective affidavits that none of the Directors nor the financial Manager exercises any control whatever over the contents of the paper. There are no materials at the disposal of the Court sufficient to contradict these statements made on oath, consequently, the denial is, in the circumstances, a sufficient answer to the Rule. I cannot but observe, however, that the further assertion in the affidavits of these two persons that the Directors perform such duties and exercise such powers only as are mentioned and defined in the Articles of Association detracts to some extent at least from the value of the previous statement. The Articles of Association show that the business of the Company is required to be managed by the Directors, while the Memorandum of Association shows that the object for which the Company was established was to acquire and take over as a going concern the business of newspaper proprietors, printers and publishers then carried on in connection with the Amrita Bazar Patrika. Consequently, the Memorandum and Articles of Association taken together may imply that it was the duty of the Directors to manage the publication of the paper, and from this point of view they might be held responsible for the publication of the articles mentioned. This inference might possibly be strengthened by the circumstance that the existence of an editor is not mentioned, not even so much as suggested in these proceedings. But although the case may, in these circumstances, be one of strong suspicion, it is impossible to hold that notwithstanding the categorical denial to the contrary, it has been established beyond doubt that the Directors were responsible for, or connected with, the actual publication of the two articles. We cannot possibly hold, as a matter of law, that the Directors of a Limited Company which owns a newspaper, are liable to be committed for contempt of Court on account of a libel published in the paper [*R. v. Judd*, (1)]. The decision in *Exp. Green* (2) cannot be treated as an authority for a general proposition of law that where a

(1) (1888) 37 W. R. (Eng.) 143; 16 Cox. 559.

(2) (1891) 7 T. L. R. 411.

limited company disseminates amongst newspapers matter amounting to contempt of Court, their Manager, merely because he was the Manager was liable to be committed. The decision rested, I think, on the facts admitted or established before the Court, which showed that the Manager was in fact responsible for all the paragraphs sent out to newspapers. Nor can we apply to the case before us the presumption which at one time was applied in England as to the responsibility of the proprietor of a newspaper for libels published in his paper. The view that the proprietor of a newspaper was answerable, criminally as well as civilly, for the acts of his servants or agents in misconducting a newspaper, enunciated by Lord Kenyon in *R. v. Walter* (1), and re-stated by Lord Ellenborough C. J. in *R. v. White* (2), and by Lord Tenterden, C. J. in *R. v. Cutch* (3), has long been obsolete in England [*R. v. Holbrook* (4)], and should unquestionably not be applied in this country in a case of the description now before us, even though it be held applicable to trials for defamation under the Indian Penal Code : *Ramasami v. Lokanada* (5), *Harisarvoothama v. King-Emperor* (6). After anxious consideration of all the materials on the record, I have thus arrived at the conclusion that the Rule must be discharged also as against Mrinal Kanti Ghosh and Pijush Kanti Ghosh.

I cannot consider the result of this trial satisfactory from the vital point of view indicated by Lord Hardwicke in *Re St. James Evening Post* (7), namely, that there cannot be anything of greater consequence than to keep the streams of justice clear and pure so that parties may proceed with security both to themselves and their characters. The persons responsible for the grave contempt of Court which has been committed have not been brought to justice. This is not a matter for legitimate surprise as the Court has not the machinery at its disposal for the discovery of the offenders and the materials available from the public records have proved insufficient for the purpose. At the same time the offenders have preferred to keep themselves in the dark and have not adopted the eminently honourable course which was pursued in two other instances in this Court and which evoked the just commendation of Sir Barnes Peacock and Sir Richard Garth respectively : *Re Banks & Fenwick*, (8) and *Surendranath Banerjee v. Bengal High Court* (9)

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(1) (1799) 3 Esp. 21.

(2) (1829) 1 Moo &amp; Malk. 271; (1811) Holt on Libel 287.

(3) (1829) 1 Moo. &amp; Malk. 433 (437).

(4) (1877) 3 Q. B. D. 60; 13 Cox. 550; (1878) 4 Q. B. D. 42; 14 Cox. 185.

(5) (1886) I. L. R. 9 Mad. 387 (399.) (6) (1909) I. L. R. 32 Mad. 338.

(7) (1742) 2 Atk. 469.

(8) (1869) 26 C. L. J. 401.

(9) (1883) I. L. R. 10 Calc. 109; L. R. 10 I. A. 171.

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They have not had the courage to come forward to avow their responsibility and either to justify their action or to express contrition for their misconduct. Even the Directors of the Company have contented themselves with a disavowal of their responsibility and have expressed no regret whatever for the articles published in a newspaper owned by the Company. In these circumstances it is undoubtedly worthy of consideration whether legislative provision should not be made to compel registration of the name of the editor and proprietor of a newspaper precisely in the same way as that of the printer and publisher. (See 44 & 45 Vict. c. 60.) It may finally be observed that, on recurrence of a case of this character the Court may find it necessary to proceed against the Company as has been done in some recent instances. No doubt, the view was maintained at one time that a Corporation could not be held liable for contempt of Court, as by reason of its impersonal nature it could not be attached: *Guilford v. Mills* (1). But the weight of modern authority is apparently against this doctrine, and the view has been maintained that proceedings by way of contempt would lie against corporations as well as individuals: in the case of individuals, the process is by attachment of the person, followed by fine or imprisonment or both; in the case of corporations, the process is by fine followed by sequestration or distraint. *R. v. Birmingham Ry Co.* (2) *London v. Lynn* (3) *Spokes v. Banbury Local Board* (4). The decision of Wright, J., in *Re Hooley* (5) is seemingly an authority only for the proposition that a limited company cannot be committed to prison for contempt: it does not decide the question whether such a company may not be fined for contempt of Court and the fine recovered by distraint or sequestration. In the Courts of the United States, the liability of a corporation for contempt of Court has been affirmed by a large preponderance of authority: *Bloomington Church v. Muscatine* (6) *West Jersey Co. v. Board of Public Works* (7) *U. S. v. Memphis Ry Co.* (8) *Re Westminster Realty Corporation* (9) *Union v. People* (10) *Stratton v. Meriwether* (11) *Schreiber v. Garden* (12) *State v. Baltimore Ry Co.* (13). One of the most recent

(1) (18'6) 2 Keb. 1; T. Raym. 152.

(2) (1844) 3 Q. B. 223.

(4) (1865) 11 Jur. (N. S.) 1010.

(6) (1855) 2 Iowa 69.

(8) (1881) 6 Fed. 237.

(9) (1908) 108 N. Y. Sup. 551.

(11) (1913) 154 Ky 839; 159 S. W. 613.

(12) (1912) 137 N. Y. Sup. 747.

(3) (1789) 1 H. Bl. 206.

(5) (1899) 6 Manson 44 (46).

(7) 1896) 58 N. J. L. 536; 37 Atl. 578.

(10) (1887) 121 Illinois App. 647.

(13) (1913) 73 W. Va. 1; 79 S. E. 834.

cases in which the question is examined as one of principle is that of *Fiedler v. Banbrick Bros.* (1) where, upon an elaborate review of earlier decisions, the conclusion was reached that corporations, though not liable to be imprisoned, were liable to be fined by way of punishment for contempt of Court. (See also *Rapalji* on Contempts, section 48 and *High* on Injunctions, section 1460). It is not necessary for me to decide finally on this occasion the liability of corporations to be punished for contempt of Court in their corporate capacity; but in view of the turn events have taken in the present proceedings, it is desirable to point out that when a grave contempt of Court has been committed by a newspaper owned by a Company, the immunity from punishment which the offenders may imagine they enjoy by reason of stolid silence, is most probably of an illusory character.

My conclusion on the whole is that the Rule must be made absolute against the Printer and Publisher, but discharged against all the other defendants.

**Chitty J.**—I have had the advantage of reading the judgments just delivered by my Lord the Chief Justice and Mr. Justice Woodroffe, and I entirely agree with what they have said generally about the case, and the orders to be passed with regard to the several respondents. I wish however to state, with regard to Babu Moti Lal Ghose that I should have been disposed to hold him responsible for the articles in question, as one who has been proved to be a Director of this company and who in that capacity has been called upon by this Court to show cause, and has shown none. As the majority of the Bench are in favour of giving him the benefit of the doubt, I do not desire to press my opinion further. I therefore concur in the order about to be passed.

**Mr. Justice Fletcher**, who is unavoidably absent to-day, desires me to say that he too was prepared to hold Babu Moti Lal Ghose responsible, but under the circumstances he also concurs in the order to be passed.

The following order was then passed :

**Sanderson C. J.**—Tarit !Kanti Biswas ! The members of the Court are unanimously of opinion that in printing and publishing the two articles in question in the *Amrita Bazar Patrika* newspaper, you were guilty of a contempt of Court.

The serious nature of it has been referred to in the judgments which have been delivered, and it is not necessary therefore for me to recapitulate what has already been said.

(1) (1912) 162 Missouri App. 528 ; 142 S. W. 1111.

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In the earlier part of your affidavit you state that you did not read the articles when they were handed to you for publication and that you inserted them in the usual course of your business as Printer and Publisher.

Later, however, in your affidavit you proceeded to try and justify the publication of the articles by alleging that they were published by you in good faith and in the public interest, a position which we consider inconsistent with that of a man who puts forward the case that he printed and published the articles in ignorance of their contents.

We are all of opinion there was not the smallest justification for the publication of such untrue statements and unjustifiable imputations as were contained in the articles.

If the person responsible for the publication of these articles had come forward and had taken the responsibility upon himself, or if you had disclosed to the Court the person who was really responsible for the publication, which must have been within your knowledge, although you might not have known the actual writer of the article, it might have been possible for us to treat the offence in your case with such leniency as your learned Counsel prayed for.

The person really responsible however has not been disclosed : but you, being the Printer and Publisher, whose identity could not be concealed and whose legal liability could not be denied, are left by your employers to bear the brunt of this matter.

We have taken all these matters into consideration, the contempt of Court however in our judgment was of such a nature that in the interest of the administration of justice it is impossible for us to pass it over without some penalty.

It is essential to vindicate the authority of the Court and to make it clear that articles such as those in question constituting a grave contempt of Court cannot be published with impunity.

Tarit Kanti Biswas ! The judgment of the Court is that you Tarit Kanti Biswas do pay to the Accountant-General of this Court a fine of Rs. 300 before 4-30 P. M. to-day, and that you be detained until such hour, or until such time as the fine is paid ; and if the fine is not paid as herein directed you be lodged on the civil side of the Presidency Jail until the said fine is paid or until the further order of this Court.

Woodroffe, Mookerjee, Chitty and Fletcher JJ. concurred.

*Messrs. H. N. Dutt, N. N. Mitter and D. C. Mitter* :—Solicitors for the Respondents.

A. T. M.

*Rule made absolute as regards the Printer  
and discharged as regards others.*

## PRIVY COUNCIL.

PRESENT : *Lord Dunedin, Sir John Edgè, Mr. Ameer Ali and  
Sir Walter Phillimore.*

MUSSUMMAT GUNJESHWAR KUNWAR,

v.

DURGA PRASHAD SINGH AND OTHERS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT FORT  
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*June, 7, 8, 11, 12,  
14 and July, 6.*

*Hindu Law—Mitakshara—Permanent blindness after birth—Exclusion from a  
share of the family property.*

Under the Mitakshara a member of the joint Hindu family, who becomes permanently blind after he is born, is not excluded from sharing in the family property by reason of a permanent and incurable blindness which was not congenital.

Appeal from a decree (May 7, 1912) of the High Court (Woodroffe and Richardson, JJ.) at Calcutta reversing a decree (March 31, 1908) of the Officiating Subordinate Judge of Bankipur who decreed the plaintiff-appellant's suit in part.

The facts of the case are fully stated in the judgment of their Lordships.

*B. Dube* for the Appellant: The evidence establishes that Bishambhar was not born blind. He was therefore entitled to his share of the family property, and Durga had no honest and *bona fide* belief in his claim in the suit of 1904 in which the compromise in question was made. The Court should not enforce that compromise but give the plaintiff the relief prayed for: *Dunnage v. White* (1); He also relied on *Imrit Konwur v. Roop Narain Singh* (2).

[*De Gruyther K. C.*, remarked that the Board did not approve of that case in *Khunni Lal v. Gobind Krishna Narain* (3)].

The onus is on the respondent Durga to show that the compromise was explained to the plaintiff's mother who was a purdanashin lady, and that she understood it. The respondent has not discharged that onus. Moreover, the plaintiff's mother had no independent advice. It is therefore submitted that the compromise is not binding on the plaintiff: *Ashgar Ali v. Delroos Banoo Begum* (4); *Sudisht*

(1) (1818) 1 Sw. 137.

(2) (1880) 6 C. L. R. 76.

(3) (1911) L. R. 38 L. A. 88; 13 C. L. J. 575.

(4) (1877) 1 L. R. 3 Calc. 324.



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*Lal v. Mussummat Sheobarat Kumwar* (1); and *Bibee Rukhun v. Shaikh Ahmed Hossein* (2).

As to the compromise of the partition suit of 1900 and the decree made in pursuance thereof, the Court had all the materials before it, and consequently they are binding on the respondent: *Manohar Lal v. Jadu Nath Singh* (3).

*De Gruyther, K. C.*, and *J. M. Parikh* for the Respondents: The evidence establishes that Bishambhar was born blind. He was therefore not entitled to inherit. The test to apply here is whether Durga had an honest and *bona fide* belief in his claim made in 1904. As to what is honest and *bona fide* belief reference was made to *Miles v. New Zealand Alford Estate Company* (4). Durga could have no personal knowledge of the fact whether his elder brother was or was not born blind, and the evidence shows that Durga had reasonable ground for an honest belief that his brother was born blind. There is nothing on record to suggest that Durga believed that his brother was not born blind. It is therefore submitted that the compromise is binding. They submitted on the evidence that the plaintiff's mother knew what she was doing.

Assuming that Bishambhar was not born blind, it is submitted that inasmuch as he became permanently and incurably blind long before 1900 he was not then entitled to partition the joint property: *Mitakshara*, Ch. 2, Sec. 10, paras. 1, 2, 3, 4, 5, 6, 7 and 9. There is no decided case on this point. The only point decided is that in order to exclude a co-parcener from inheritance he must have been born blind: *Murarji Gokuldas v. Parvatibai* (5).

As to the form of the decree where a compromise with a minor is set aside at the minor's instance, reference was made to *Manohar Lal v. Jadu Nath Singh* (3): Reference was also made to *Lala Muddun Gopal v. Mussumat Khikhinda Koer* (6).

*Dube* replied.

The Judgment of their Lordships was delivered by

July, 6.

**Sir John Edge.**—This is an appeal from a decree, dated the 7th May, 1912, of the High Court at Calcutta which reversed a decree, dated the 31st March, 1908, of the Officiating Subordinate Judge of Bankipur and dismissed the suit. The plaintiff who is the

(1) (1881) L. R. 8 I. A. 39; I. L. R. 7 Calc. 245.

(2) (1874) 22 W. R. 443.

(3) (1906) L. R. 33 I. A. 128; 4 C. L. J. 8; I. L. R. 28 All. 585.

(4) (1882) 32 Ch. D. 266 (283, 284).

(5) (1876) I. L. R. 1 Bom. 177.

(6) (1890) L. R. 18 I. A. 9; I. L. R. 18 Calc. 341.

appellant here is a minor and is suing by her next friend. The defendants are Durga Prashad Singh, an uncle of the plaintiff, Mussummat Harbans Kunwar, her mother, and three assignees of the defendants Durga Prashad Singh.

The suit was brought on the 21st July, 1906, to obtain a declaration that a compromise which was entered into between Durga Prashad Singh, who is the first defendant in this suit, and Mussummat Harbans Kunwar, and a decree dated the 30th August, 1904, which was made in pursuance of that compromise, are not binding upon the plaintiff; a declaration that the plaintiff's father, Bishambhar Prashad Singh, was at the time of his death separate from his brother, the defendant, Durga Prashad Singh; a declaration that the defendant, Mussummat Harbans Kunwar, by reason of her conduct in entering into the said compromise, had ceased to be entitled to any rights in the estate of her deceased husband, Bishambhar Prashad Singh, and that the plaintiff was entitled to the present possession of that estate; a declaration of the plaintiff's reversionary right in case she should not be held entitled to the possession of the property in dispute during her mother's lifetime; and for other relief. The Subordinate Judge gave the plaintiff a declaration that the compromise and the decree of the 30th August, 1904, which was made on the basis of that compromise, were not binding upon her and, on the ground that the plaintiff was not entitled to get possession of the property during the lifetime of her mother, dismissed the suit so far as the claims for possession and mesne profits were concerned. The High Court in appeal by its decree dismissed the suit. From that decree of the High Court this appeal has been brought.

The plaintiff and the defendant Durga Prashad Singh are descended from Lal Behari Singh, who died on the 24th October, 1885, leaving him surviving two sons, then minors, Bishambhar Prashad Singh, the plaintiff's father, and the defendant, Durga Prashad Singh, his mother, Mussummat Gulab Kunwar, and his widow, Mussummat Mohun Kunwar. The family of Lal Behari Singh was a joint Hindu family, governed by the law of the Mitakshara. Bishambhar Prashad Singh died on the 2nd August, 1902, leaving surviving him only one child, the plaintiff, and Mussummat Harbans Kunwar, his widow. The compromise referred to was made in a suit which Durga Prashad Singh had brought on the 7th May, 1904, against Mussummat Harbans Kunwar, her daughter the plaintiff, then and still a minor, and other persons. In his plaint in that suit Durga Prashad Singh alleged

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that his brother Bishambhar Prashad Singh had been born blind and was excluded from inheritance to his father's estate by reason of his congenital blindness ; that all the proceedings in a suit against Bishambhar Prashad Singh for partition which Durga Prashad Singh's father-in-law, Mahabir Prashad Singh, had, on the 25th January, 1900, brought, assuming to act as his guardian and next friend, were illegal ; and that no partition had taken place.

If Bishambhar Prashad Singh was not disqualified from sharing in the family properties, he was entitled on separation to a moiety of the property of the joint Hindu family, and if in fact he did, in such circumstances, separate from his brother Durga Prashad Singh, Mussummat Harbans Kunwar was on his death entitled to a Hindu widow's interest in his moiety, and on her death the plaintiff would inherit to her father. By the compromise which is in question in this suit Mussummat Harbans Kunwar for herself and her daughter, the plaintiff, abandoned all claim to the property of Bishambhar Prashad Singh, admitted that Bishambhar Prashad Singh had been born blind, and was consequently excluded by Hindu law from all right of inheritance ; that he and his brother Durga Prashad Singh had not separated ; and that Durga Prashad Singh was entitled to the whole family property by survivorship. By the compromise Durga Prashad Singh gave to Mussummat Harbans Kunwar six villages, representing about one-fourth of the family property for her life, with remainder to the plaintiff and undertook to pay certain debts.

It has been admitted on both sides that Bishambhar Prashad Singh was in fact blind at the time of his death. The Subordinate Judge found that Bishambhar Prashad Singh was not born blind. He also found that Mussummat Harbans Kunwar, who is a purdah-nashin lady, was not given a sufficient opportunity of obtaining independent advice as to the terms of the compromise before entering into it. The High Court in the appeal did not expressly find that Bishambhar Prashad Singh had or had not been born blind, but came to the conclusion that Durga Prashad Singh had reasonable grounds for believing that there existed materials for a *bona fide* litigation and compromise, and that the question was not whether Durga Prashad Singh was right in his claim that Bishambhar Prashad Singh had been excluded from a right to share in the family property by reason of his having been born blind, but was whether Durga Prashad Singh honestly believed that Bishambhar Prashad Singh had been born blind.

The main questions upon the determination of which the decision of this appeal must, in their Lordships' opinion, depend are,

firstly, is a man who is a member of a joint Hindu family, which is governed by the law of the Mitakshara, and who becomes permanently blind after he is born, excluded by Hindu law from sharing in the family property by reason of a permanent and incurable blindness which was not congenital; secondly, was Bishambhar Prashad Singh, who was the father of the plaintiff, born blind; and, thirdly, did Bishambhar Prashad Singh and his brother, the defendant, Durga Prashad Singh, separate and remain separate. The first of these questions is a question of law, the second and third are questions of fact.

It will be convenient to deal at once with the first question, that of law. In his written statement the defendant, Durga Prashad Singh, alleged that Lal Behari Singh died "leaving him surviving two sons, namely, the plaintiff's father, Babu Bishambhar Prashad Singh, and this defendant; and Mohun Kunwar, widow, and Gulab Kunwar, mother; but the plaintiff's father never succeeded him, nor could he succeed him, according to law, as he was congenitally blind."

The first ground of Durga Prashad Singh's memorandum of appeal to the High Court was :—

"1st. For that, upon the entire evidence on the record, the Court below ought to have held that Bishambhar Prashad Singh was congenitally blind, and he had no right to succeed to his paternal estate; the reasons assigned by the said Court for holding otherwise are erroneous and unsound."

The 17th ground of that memorandum of appeal was as follows :—

"For that even assuming, without admitting, that Bishambhar was not born blind, but became blind after birth, as alleged by the plaintiff, the Court below ought to have held that, according to the Mitakshara law of the Benares School, he was excluded from participation of a share, inasmuch as the blindness occurred before the alleged partition."

It does not appear that the 17th ground of that memorandum of appeal was relied upon in the High Court, but as the point has been raised and pressed before this Board in this appeal, their Lordships will now deal with it.

The question as to whether blindness which is not congenital excludes by Hindu law a member of a joint Hindu family from sharing in the family property does not appear to have been decided by this Board. The text of Manu on this subject, as translated, is as follows: "Eunuchs and outcasts, persons born blind or deaf,

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madmen, idiots, the dumb, and such as have lost the use of a limb, are excluded from a share of the heritage."

In 1874 the High Court at Calcutta, in *Mohesh Chunder Roy and others v. Chunder Mohun Roy and others* (1), a case in which the law of the Dayabhaga applied, decided that the blindness which, under the Hindu law as recognised in Bengal, excludes an afflicted person from inheritance, refers to congenital blindness and not to loss of sight which supervened after birth. In that case the High Court Judges had before them the text of Manu which is above quoted.

In 1876 the High Court at Bombay in *Murarji Gokuldas and others v. Parvatibai* (2), decided that according to the Hindu law, as prevailing in the Bombay Presidency, blindness, to cause exclusion from inheritance, must be congenital. In the latter case, Sir Michael Westropp, C.J., in a learned and exhaustive judgment, after considering the texts and authoritative commentaries bearing on the subject including the text of Manu and the Mitakshara, said that:—

"Upon the best consideration we [he and Sargent, J.] have been able to give to this question, we are of opinion that there is a considerable preponderance of authority in favour of the conclusion that blindness, to cause exclusion from inheritance, must be congenital."

The Sanskrit word in the Mitakshara on this subject has been translated as "a blind man." The description "a blind man," if that be the correct translation, is somewhat indefinite, and their Lordships consider that, if that be the correct translation, it is not to be assumed that the author of the Mitakshara could have intended by the use of an ambiguous description to extend the prohibition of Manu and to exclude from a share in the heritage persons who become blind after they were born.

As was observed by Jackson, J., in *Mohesh Chunder Roy v. Chunder Mohun Roy* (1), to which reference has been made above: "A rule of Hindu law which is relied upon as preventing the natural course of inheritance, ought to be clear and unmistakable". Rajkumar Sarvadhikari, in his "Hindu Law of Inheritance," p. 956, says:—

"Blindness, to cause exclusion from inheritance, must be congenital. Mere loss of sight which has supervened after birth is not a ground of disqualification. Incurable blindness, if not congenital, is not such an affliction as, under the Hindu law, excludes a person from inheritance."

(1) (1874) 14 B. L. R. 273.

(2) (1876) I. L. R. 1 Bom. 177.

The above is, their Lordships hold, the true rule.

The oral evidence on the question as to whether Bishambhar Prashad Singh was born blind is very conflicting, but on the whole their Lordships would be prepared to find on the oral evidence, if it stood alone, that Bishambhar Prashad Singh's blindness was not congenital. There are, however, facts proved by records and other documentary evidence which can lead to no other conclusion than that Bishambhar Prashad Singh was not blind when he was born, and was treated by the family and by others as a person entitled to share in the family property.

Lal Bahari Singh, who was the father of Bishambhar Prashad Singh and Durga Prashad Singh, died on the 24th October, 1885, when they were minors, Bishambhar Prashad Singh being then about 9 years old and Durga Prashad Singh being then about 1½ years of age. On the 7th December, 1885, their grandmother, Mussummat Gulab Kunwar, and their mother, Mussummat Mohun Kunwar, presented a joint petition to the District Judge of Gaya in which they stated that Bishambhar Prashad Singh and Durga Prashad Singh, the minor sons of Lal Behari Singh deceased, were "as heirs of their deceased father the owners in possession of all the properties, the approximate value of which is given below," and they prayed that a certificate of guardianship under Act XL of 1858 might be granted to them "for the protection of the person and the administration of the properties of the minors." On that petition the District Judge on the 12th February, 1886, appointed Gulab Kunwar and Mohun Kunwar to administer the estate of the minors during their minorities and they were appointed guardians. The names of the minors were entered in the land register as the names of owners, and Gulab Kunwar and Mohun Kunwar continued to manage the estate on behalf of and for the joint benefit of the minors until Mohun Kunwar died late in the year 1897.

After the death of Mohun Kunwar, Mussummat Gulab Kunwar acted as sole guardian until Bishambhar Prashad Singh came of age.

On the 17th June, 1897, Bishambhar Prashad Singh presented a petition to the District Judge of Gaya, in which he stated that he had attained the age of majority, and was willing to look after his own business without the guardianship of Gulab Kunwar and Mohun Kunwar. Notice was thereupon given by the District Judge to the guardians to produce the certificate of guardianship, and to show what objection they might have. On the 4th September, 1897,

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they filed their objection, and in it stated that they had no objection to Bishambhar Prashad Singh being declared major, and that they had given up the management in respect of his share and he was looking after his affairs; but they objected that the management of the affairs of Durga Prashad Singh should remain with them as he was still a minor, and they stated that they "have and can have no objection to whatever proceedings may be taken by the Court with regard to the share of Babu Bishambhar Prashad Singh." The District Judge declared Bishambhar Prashad Singh of age. On the 29th September, 1898, Bishambhar Prashad Singh presented a petition to the District Judge of Gaya, in which he stated:—

"1. That Mussumats Gulab Kunwar and Mohun Kunwar were appointed guardians of your petitioner and his brother Babu Durga Prashad Singh *alias* Beni Madho Prashad Singh, by an order of the Court, dated the 12th February, 1886.

"2. That Mussumat Mohun Kunwar died in Assin 1305-1897.

"3. That the two brothers are joint.

"4. That your petitioner attained his age of 21st year in March 1897, and that he was declared major by the order of this Court.

"5. That under the law no certificate of guardianship is necessary in a joint family, and the property or share of Babu Durga Prashad Singh *alias* Beni Madho Prashad Singh not being defined, no guardian of his property should be appointed or retained, nor could the certificate of guardianship of the properties of the two brothers have any effect after the attainment of majority by any of them.

"6. That consequently now as your petitioner represents the whole estate of your petitioner and his brother, there is no necessity of retaining the said Mussumat Gulab Kunwar as the guardian of the minor Babu Durga Prashad Singh *alias* Beni Madho Prashad Singh, nor can she under the law continue to be his guardian.

"Your petitioner therefore prays that under Section 39, Clause (1), Act VIII of 1890, your Honour will be graciously pleased to declare that the guardianship of Mussumat Gulab Kunwar has terminated, and cancel the certificate of guardianship dated the 12th February, 1886, aforesaid, or pass such other order and grant such relief as may to your Honour seem just and fit."

In reference to that petition the District Judge made the following orders:—

"2nd December, 1898. Return of service of notice on Mussumat Gulab Kunwar filed. House service made. Identifier not come. One week given."

"9th December, 1898. Affidavit of identifier filed.

"10th December, 1898. The grandmother is the sole surviving guardian, and she is said to be an old woman of about 80, and files no objection. They all live together, so there is no question of the personal benefit of the minor. The elder brother as karta of the family has the inherent right to guardianship, and the previous order of guardianship to the grandmother has become infructuous since he attained his majority. It will therefore be revoked."

After the order of guardianship had been revoked, Bishambhar Prashad Singh managed the family properties for himself and for his brother Durga Prashad Singh, and on their joint behalf brought suits and obtained decrees. He gave way to bad habits, became extravagant and contracted debts. On the 25th January, 1900, Mahabir Prashad Singh, who was the father-in-law of Durga Prashad Singh, then a minor, as the next friend of Durga Prashad Singh, brought a suit for partition against Bishambhar Prashad Singh, in the Court of the Subordinate Judge of Gaya, and in the plaint stated—"that according to the Mitakshara school of law, the plaintiff [Durga Prashad Singh] and the defendant [Bishambhar Prashad Singh] are the proprietors in equal shares of all the joint properties specified and detailed in Schedule No. 1 of this plaint."

It was also alleged in this plaint—"that the defendant [Bishambhar Prashad Singh] is blind from birth and is wholly incapable of managing the joint properties, and owing to his being blind and an extravagant man the properties are being wholly ruined."

And it was further alleged in the plaint in that suit—"that if the properties of the said joint family are allowed to remain in the hands of the defendant [Bishambhar Prashad Singh], he will ruin all the joint properties before your petitioner [Durga Prashad Singh] attains majority, and your petitioner will be put to difficulty and subjected to unnecessary expenses in seeking redress after his attaining majority. Hence the plaintiff [Durga Prashad Singh] has no other remedy than to get the properties partitioned. Therefore the plaintiff's necessity to bring this suit."

Mahabir Prashad Singh has not been called as a witness in this suit, nor has his absence been satisfactorily accounted for. On behalf of Durga Prashad Singh it has been suggested that his father-in-law, Mahabir Prashad Singh, was acting in collusion with and in the interests of Bishambhar Prashad Singh—an insinuation which appears to their Lordships to be wholly groundless.

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The statement in the plaint that Bishambhar Prashad Singh was blind from birth was irrelevant, and, further, it was inconsistent with the claim that the family property should be partitioned between the brothers.

There was and could have been no defence to that suit for partition. Durga Prashad Singh, on whose behalf the suit was brought was entitled to have his share partitioned off. The suit was compromised and by consent and with the sanction of the Subordinate Judge as to the compromise a decree for partition was made.

In accordance with that decree for partition the immovable property was partitioned, and the shares of the brothers were divided by metes and bounds, the name of each brother was entered in the Land Register in respect of his separated share, and such of the movable property as was capable of being divided was divided between them, and complete separation between them was effected.

It has been said that Mussummat Gulab Kunwar and Mussummat Mohun Kunwar did not know that under the Hindu law a person who was born blind was thereby disentitled to share in family property. It is inconceivable that ladies in their position could have been in ignorance of that well-known rule of the Hindu law, and if the evidence which was given on behalf of Durga Prashad in this suit was true those ladies had several male relations and friends who were aware that Bishambhar Prashad Singh was born blind and who must have known what the state of Hindu law was. It has also been said that the action of Gulab Kunwar and of Mohun Kunwar is explainable on the supposition that they did not wish to deprive Bishambhar Singh of a share in the family property. That is an explanation which their Lordships cannot accept.

If Bishambhar Prashad Singh had been in fact born blind his mother, Mohun Kunwar, and his grandmother Gulab Kunwar, must have known from the time of his birth that he suffered from congenital blindness. It must have been a fact of which neither of them nor the plaintiff nor any near relation of the family could have been in ignorance; but the first time when it was alleged that Bishambhar Prashad Singh had no right to share in the family property was when Mussummat Harbans Kunwar, after the death of Bishambhar Prashad Singh, applied to the District Judge of Patna for a certificate under Act VII of 1889.

To that application Mussummat Gulab Kunwar, on behalf of Durga Prashad Singh, on the 10th December, 1902, filed an objection in which she stated—3. That the aforesaid Bishambhar Prashad Singh was born blind and died as such. 4. That the aforesaid

Bishambhar Prashad Singh had no right to any properties which were ancestral to the family under law, and that the petition is therefore liable to be rejected."

Their Lordships have without any doubt come to the conclusion that Bishambhar Prashad Singh was not born blind, and that Durga Prashad Singh could not possibly have been in ignorance or in doubt as to that fact, and had, when he induced Mussummat Harbans Kunwar to enter into the compromise on behalf of the plaintiff which is in question in this suit, no honest and *bona fide* belief in the claim which he was making. That compromise, and the decree which was made in pursuance of it, could not be allowed to affect in any way the right of the minor, and she was entitled to the declaration which the Subordinate Judge made in her favour. In order to avoid any possible misconception arising as to the meaning of the decree of the Subordinate Judge, the following words—"whose action in connection therewith may be construed as one done for the transfer of the property left by her husband"—must be omitted from that decree. With that omission the decree of the Subordinate Judge should be affirmed, and the decree of the High Court in the respondent's appeal should be set aside with costs. As regards the appellant's appeal to the High Court with reference to the question of possession, the appeal against the High Court's decree was not argued before their Lordships, and under these circumstances the decree of the High Court will stand. The respondents Durga Prashad Singh, Ritu Singh, Lachmi Narayan Rajput and Tori Mahton must pay the costs of the appeal to His Majesty in Council and of their appeal to the High Court. Upon the appellant's cross-appeal to the High Court, the High Court made no order as regards the costs, and this decree stands.

Their Lordships will humbly advise His Majesty accordingly

*Barrow, Rogers & Nevill* :—Solicitors for the Appellant.

*T. L. Wilson & Co.* :—Solicitors for the Respondents.

J. M. P.

*Appeal allowed in part.*

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PRESENT: *Lord Dunedin, Lord Shaw, Lord Sumner,  
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ABDULLAH ASHGAR ALI KHAN

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GANESH DASS.

[ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER  
IN BELUCHISTAN.]

*Res Judicata*—*British Beluchistan Regulation (IX of 1896), Sec. 10*—"Heard and finally decided"—*Proceedings in a former suit—Practice.*

To support a plea of *res judicata* it is not enough that the parties are the same and that the same matter is in issue. The matter must have been heard and finally decided :

Where in a suit on a bond the defendant denied liability on the ground that it had been obtained from him by the fraud of the plaintiff, and it appeared that in a former suit by the defendant for a cancellation of the bond on the same ground the Court of first instance held that the defendant had failed to establish his allegation of fraud and dismissed the suit : this judgment was affirmed by the first appellate Court, but in the second appeal the final appellate Court concurred in dismissing that suit as not properly constituted, without entering into the merits of the case :

*Held*, that the issue as to fraud had not been "heard and finally decided" in the former suit within the meaning of section 10 of the British Beluchistan Regulation IX of 1896 ; and was not *res judicata*, as the second appeal in that suit had put an end to the finality of the decision of the lower Courts whose judgments were superseded by the judgment of the final Court of appeal.

*Sheosagar Singh v. Sitaram Singh* (1) followed.

Appeal by special leave from a judgment and decree of the Judicial Commissioner of Beluchistan, dated the 31st March 1914, affirming a judgment and decree of the District Judge of Quetta Pishin, dated the 21st November, 1913. The facts of the case are sufficiently stated in their Lordships' judgment.

*A. M. Dunne* for the Appellant : submitted that the defence was not barred on the principle of *res judicata* by the judgment of the Judicial Commissioner, dated the 20th October, 1913. The Judicial Commissioner purposely refrained from dealing with the merits of the case. The point was not 'finally' decided within the meaning of section 10 of the British Beluchistan Regulation IX of 1896. Reliance was placed on *Sheosagar Singh v. Sitaram Singh* (1). The Judicial Commissioner was the final appellate Court both on

(1) (1897) L. R. 24 I. A. 50 ; I. L. R. 24 Calc 616.

law and facts. It did not decide the issue of fact. Reference was made to *Balkishen v. Kishen Lal* (1); *Gungabishen v. Roghoonath* (2); *Chunder Coomar v. Sib Sundari* (3).

*B. Dube* for the Respondent: Since the judgment under appeal it has been decided that the appellant's suit to cancel the deed of dissolution of partnership was barred by limitation. That deed therefore stood and could not be questioned. The present suit on the bond was consequential on that deed. The appeal was a pure technicality. It is true those papers had not been printed. Nevertheless, the appellant had no case on the merits.

*Dunne* replied.

The judgment of their Lordships was delivered by

**Mr. Ameer Ali:**—The only point for determination involved in this appeal turns upon the meaning to be attached to the words "finally decided" in section 10 of the British Beluchistan Regulation IX of 1896. That section provides as follows:—

"A Court shall not try any suit in which the matter in issue has been heard and finally decided by a Court of competent jurisdiction in a former suit between the same parties in the same rights, or between parties under whom they or any of them claim."

A short statement of the facts will explain how the question has arisen.

The parties to the litigation carried on certain business in British Beluchistan in partnership with two other men; in July 1910 they agreed to dissolve the partnership; according to the plaintiff, Ganesh Dass, accounts were duly adjusted, when a sum of over 9,900 rupees was found due from the defendant, Ashgar Ali Khan; on the 12th July a formal deed of dissolution was executed by the four partners, and on the day following the defendant executed the bond on which the present suit is brought. The defendant's case is that he signed the deed of dissolution which embodied the settlement and executed the bond, agreeing to pay the amount alleged to be due from him, on the fraudulent representation of the plaintiff that the adjustment of accounts was correctly made and on the assurance that should the defendant upon the examination of the accounts at his leisure discover any mistakes they would be rectified. The defendant alleges that it was on the faith of these representations he executed the two documents. He further alleges that some days after the execution of the deed of dissolution and the bond in suit

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(1) (1888) I. L. R. 11 All. 148.

(2) (1881) I. L. R. 7 Calc. 381.

(3) (1882) I. L. R. 8 Calc. 631.

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he had an opportunity to examine the statement of account, which he found to be wholly incorrect and misleading, that thereupon he called upon the plaintiff and the other partners to make a proper adjustment, undertaking to pay any amount that might on such further examination be found due from him. The plaintiff, Ganesh Dass, refused to accede to the proposal, and thereupon the defendant brought a suit on the 22nd July, 1911, in the Court of the Assistant Commissioner of Quetta for a cancellation of the bond of the 13th July, 1910, on the ground that he was induced to execute it by the fraudulent representations of the present plaintiff. The written statement of Ganesh Dass is not on the record of this appeal, but it appears from the judgment of the Judicial Commissioner in that case that among other pleas Ganesh Dass urged that, the bond being based on the dissolution deed and being merely executed to record the manner in which the payment of the amount due to him was to be made, a suit for the cancellation of the bond alone would not lie.

The defendant's suit for cancellation of the bond came for trial before the Assistant Commissioner of Quetta, and he held that the defendant, Ashgar Ali Khan, had failed to establish his allegation of fraud. He accordingly dismissed the action, and his judgment was affirmed on appeal by the District Judge on the 30th May, 1913.

The defendant thereupon preferred a second appeal under the provisions of Regulation IX of 1896 to the Court of the Judicial Commissioner of British Beluchistan, which is the final appellate Court in that province. The Judicial Commissioner, Mr. Archer, considered that the objection of Ganesh Dass to the frame of the suit was well founded, and accordingly, without entering into the merits of the case, dismissed the defendant's appeal against the orders of the lower Courts dismissing his action.

The Judicial Commissioner gave his decision in the following words, the exact import of which is not disputed. He says first :—

"Now it appears to me obvious that the respondent's objection to the frame of the suit was well founded, and that the plaint should either have been returned for amendment or rejected."

And then, after commenting on several mistakes in procedure in the Courts below, he proceeds as follows :—

"I purposely refrain from going in detail into the merits of the case, because they cannot be discussed without bringing in the question of the validity of the dissolution agreement, a matter which is not formally before the Courts. It is sufficient to say that after careful consideration of the record and the pleadings I am not pre-

pared to interfere with the orders of the lower Courts dismissing the appellant's suit, since, for the reasons given above, I hold that the bond of which cancellation is sought is merely consequential on the deed of dissolution of partnership, and that a suit for avoiding the bond cannot succeed as long as the dissolution deed remains in force."

On the 14th October, 1912, the plaintiff, Ganesh Dass, instituted the present suit on the bond executed by the appellant on the 13th July, 1910. The defendant denied liability on the ground that it had been obtained from him by the fraud of the plaintiff.

It is to be observed that whilst this suit was pending in the Court of the Judicial Commissioner the defendant brought an action to have the deed of dissolution cancelled, on the ground of fraud, but it was held that it was barred under the statute of limitation.

In Ganesh Dass's suit on the bond the Indian Courts have held that the issue raised by the defendant was *res judicata*, and that they were precluded by the provisions of section 10 of Regulation IX of 1896 from entering upon an enquiry whether the bond had been obtained from him on fraudulent representation. In this view they decreed the plaintiff's claim without entering into the merits of the defence. The defendant has appealed to His Majesty in Council, and it is contended on his behalf that the Indian Courts have wrongly applied the rule of *res judicata* to the defence in the present case, as his allegation regarding the execution of the bond on the fraudulent representations of the plaintiff has never been decided in the Judicial Commissioner's Court.

It appears to their Lordships that the contention is well founded. "The matter in issue" in the present suit is no doubt the same as in the defendant's own action. It is clear, however, that although the two first Courts had found against his allegation, the final Court of appeal refused to determine the issue. Section 10 of the Regulation creates an estoppel by judgment only when the "matter in issue" has been "finally decided." These words have received judicial interpretation in the case of *Sheosagar Singh v. Sitaram Singh*(1).

In that case the Board had to deal with the identical question of *res judicata* arising under section 11 of the Indian Civil Procedure Code, which, so far as the question under discussion is concerned, is *in pari materia* with section 10 of the Beluchistan Regulation. Lord Macnaghten, delivering the judgment of their Lordships, explained the rule as follows :—

"To support a plea of *res judicata* it is not enough that the parties are the same and that the same matter is in issue. The matter must

(1) (1895) L. R. 24 I. A. 50 ; I. L. R. 24 Calc. 616.

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have been 'heard and finally decided.' If there had been no appeal in the first suit the decision of the Subordinate Judge would no doubt have given rise to the plea. But the appeal destroyed the finality of the decision. The judgment of the lower Court was superseded by the judgment of the Court of appeal. And the only thing finally decided by the Court of appeal was that in a suit constituted as the suit of 1885 was, no decision ought to have been pronounced on the merit."

Their Lordships will therefore humbly advise His Majesty that the judgments of the Courts in India in this case should be set aside and that it should be remitted to the Judicial Commissioner of British Beluchistan to direct a re-trial by the Court of first instance. The respondent will pay the costs of this appeal and of the application made on his behalf on the 19th July, 1917; the costs incurred by the parties in India will abide the result.

*T. L. Wilson & Co.* :—Solicitors for the appellant.

*W. W. Box & Co.* :—Solicitors for the respondent.

J. M. P.

*Appeal allowed.*

PRESENT :—*Lord Dunedin, Lord Shaw, Lord Sumner,*  
*Sir John Edge and Mr. Ameer Ali.*

H. H. BRIJ INDAR SINGH

v.

LALA KANSHI RAM AND OTHERS.

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[ON APPEAL FROM THE CHIEF COURT OF THE PUNJAB]

*Limitation—Sufficient Cause for not presenting an appeal within the prescribed period—Whether time spent in applying for review may be excluded in computing the period—Whether mistake of law may amount to sufficient cause—Indian Limitation Act (Act IX of 1908) Secs. 5, 14—Judicial discretion—Duty of superior Court when it is questioned—Abatement of suits should not be pronounced ex parte—Procedure in questioning abatement—Whether review or appeal is the proper remedy—Code of Civil Procedure (Act XIV of 1882) Secs. 365, 366, 368, 371 and 588—Substitution of parties in miscellaneous appeal—Sufficient for all stages of a suit.*

All that S. 5 of the Limitation Act (IX of 1908) requires in express terms as a condition for the exercise of the discretionary power of admitting an appeal

presented after time is 'sufficient cause for not presenting' it within time. The true guide for a Court is whether the appellant has acted with reasonable diligence in prosecuting his appeal and if he has been delayed by prosecuting other civil proceedings, e. g., a review, whether such proceedings were reasonably prosecuted and in good faith.

A mere mistake in law is not *per se* sufficient cause for asking the Court to exercise its discretion under section 5, but when it has in fact occasioned erroneous proceedings it may be the foundation for an application for the indulgence which may be granted under section 5.

These rules having been laid down by Full Benches in all the Courts of India and acted on for years the Privy Council will not interfere with them, whatever the law in England and whatever they might have been disposed to do if the matter were open.

*Ramjiwan Mal v. Chand Mal* (1) overruled. *Balwant Singh v. Gurnani Ram* (2); *Brij Mohan Das v. Mannu Bibi* (3); *Karm Baksh v. Daulat Ram* (4) and *Brojender Coomar Roy Chowdhry's case* (5) approved.

If a Judge purporting to exercise discretion does so under the view that there is no general rule, when in fact there is one, he misdirects himself as to the law to be applied to the case, and the superior Court must either remit the case or exercise the discretion themselves.

*Sharp v. Wakefield* (6) relied on.

An order abating a suit is tantamount to a judgment in favour of defendant and should not be pronounced *ex parte* without notice to the opposite side.

Section 371 of the Code of Civil procedure, 1882, which gives a remedy by review against an abatement order, is available to a plaintiff whether such order is passed under section 366 or section 368. The appeal allowed by section 588 is intended for matters other than abatement.

Where a suit in a District Court was delayed pending disposal by the Chief Court of an appeal against an interlocutory order passed in such suit, and substitution of parties was effected only in the Chief Court in such appeal and not in the District Court:

*Held*, that the introduction of a plaintiff or defendant for one stage of a suit is an introduction for all stages, and that it was unnecessary to again apply to substitute parties in the District Court.

Appeal from an order of the Chief Court of the Punjab, dated January 20, 1911, confirming an order of the District Judge of Ferozepur, dated March 16, 1908.

The facts of the case are sufficiently stated in their Lordships' judgment.

*De Gruyther, K. C.*, and *O'Gorman* for the appellant.

*Zeffert* for the Respondent A. A. Coates (one of the representatives of G. H. Coates deceased.)

(1) (1888) I. L. R. 10 All. 587.

(3) (1897) I. L. R. 19 All. 348 F. B.

(5) (1867) 7. W. R. 529 F. B.

(2) (1883) I. L. R. 5 All. 591.

(4) (1888) P. R. 478 F. B.

(6) (1891) A. C. 173.

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The other respondents did not appear.

*De Gruyther, K. C.*, for the appellant: The Chief Court erred in setting aside the order of the District Judge Prenter, whereby he set aside the abatement order passed by District Judge Sanford. The new District Judge had power in any case to pass that order under section 371 of the Civil Procedure Code, 1882, but apart from that section the present appellant had the right to apply to him, as his predecessor's order was *ex parte*.

*Suri Bhatta v. Sitarama Bhatta* (1) does not decide the point for which it is cited by the Chief Court, *viz.*, that section 371 does not apply to abatement on the death of a defendant: the remark of Turner C. J. to that effect is *obiter dictum*. The other case cited by the Chief Court, *viz.*, *Sham Singh v. Sant Singh* (2), merely approves the Madras Code.

But assuming that the Chief Court's judgment setting aside District Judge Prenter's order was correct and by appealing against District Judge Sanford's order appellant acquiesced in that judgment, I contend that our appeal was within time. The Punjab Code, Act XVI of 1884, section 42 provides that an appeal to the Chief Court should be made within 90 days. I claim under sections 12 and 14 of the Indian Limitation Act, to exclude the period from the 24th April 1908 to the 6th April 1909, being the time during which we were prosecuting with due diligence another civil proceeding. It was only on the 6th April 1909, that we learnt through the Chief Court that we were wrong in proceeding by way of review. It is expressly laid down by section 14 that time spent in taking other proceedings is to be excluded in computing the period for suits; and I submit that the same principle applies by analogy to appeals, so as to constitute "sufficient cause" under section 5: *Balwant Singh v. Gumani Ram* (3).

The learned Judge in the Chief Court followed the decision in *Ramjiwan Mal v. Chand Mal* (4), where it was laid down that a mistake of law could not constitute "sufficient cause" within section 5. That decision was overruled in *Brij Mohan Das v. Mannu Bibi* (5).

To the same effect is No. 183 P. R. 1888, which being a full Bench decision of his own Chief Court was binding on the learned Judge.

(1) (1883) I. L. R. 7 Mad. 195.

(2) (1885) 22 P. R. 41.

(3) (1883) I. L. R. 5 All. 391.

(4) (1888) I. L. R. 10 All. 587.

(5) (1897) I. L. R. 19 All. 348 F. B.

The principle for which I contend has long been approved in Calcutta : *Nobbo Kissen Singh v. Kaminee Dossee* (1), a decision of 14 Judges ; *Brojender Coomar Roy, Chowdhry's case* (2)

• *Zeffer* for the respondent A. A. Coates : The appeal to this Board is incompetent. When a decree of the High Court affirms the decree appealed against, the Board will not hear an appeal even though admitted, unless some substantial question of law is involved : *Karuppanan Servai v. Srinivasan Chetti* (3). There is no such question of law here. The question whether the Court used its discretion or not can only be a question of fact.

The certificate here was granted under section 109 (c) of the Code of Civil Procedure, 1908, and being under the last clause of section 110 the appeal must involve some substantial question of law.

(*De Gruyther* referred to Order 45 rule 3, "or that it is otherwise fit for appeal").

The words of section 109 are "as hereinafter provided"; this must refer to section 110.

[Lord Dunedin referred to section 21.]

In any case a substantial question of law is requisite because the order appealed from affirmed the decision of the Court immediately below section 110. It is unnecessary that such order should affirm such decision on the merits : *Beni Rai v. Ram Lakhan Rai* (4).

Secondly, I submit that section 5 gives a discretion to the Judge, and that the Board will not override the exercise of that discretion unless arbitrarily used. It is not enough to show that the Court below might have used its discretion otherwise : *Sharp v. Wakefield* (5). It is necessary for the appellant to show that the lower Court exercised its discretion capriciously or arbitrarily : *Bhimrao v. Ayyappa* (6).

It is impossible to contend this was the case here, when it is quite clear the Judge exercised his discretion judicially and that he carefully considered No. 183 P. R. (1888) and held that it did not bind him in this case.

Thirdly, I contend the Judge exercised his discretion rightly. A mistake of law on the part of solicitor, counsel or litigant is not "sufficient cause" for extending the period of appeal.

*In re Helsby* (7), *Coles v. Ravenshaw* (8). There can be no

(1) (1865) 24W. R. Mis. 35.

(3) (1901) L. R. 29 L. A. 38.

(5) (1888) 21 Q. B. D. 66 (801).

(7) (1894) 1 Q. B. D. 742 (C.A.).

(2) (1867) 7 W. R. 529.

(4) (1898) 1 L. R. 20 All. 367.

(6) (1906) 1 L. R. 31 Bom. 33 (36, 37).

(8) (1907) 1 K. B. 1.

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such thing as *bona fide* mistake of law : *Bachi v. Ahsanullah Khan* (1).

Further, I submit that in fact the appellant did not go to any Court at all to have the abatement under section 368 set aside. His application to District Judge Prenter was in terms an application under sections 365 and 371 of the Code of Civil Procedure, 1882. It was the learned Judge himself who took action under section 368 as well. The plaintiff appellant has never up to date made the application required by that section, specifying the name, description and place of abode of the legal representative of the deceased defendant. Without such application District Judge Prenter's order, so far as defendants were concerned was without jurisdiction.

The order of the Chief Court dismissing the appeal as time-barred can be supported on other grounds. No appeal against the order of abatement lies. That order was passed in March 1908, but the appeal was lodged in April 1909. The new Code of Civil Procedure came into force on January 1, 1909. Under the old Code there was right of appeal from section 368 under section 588 (18), but the new Code gives no such right. The provision corresponding to section 368 is order 22, rule 4; and Order 22 rule 2 applies to non-joinder of defendants, a procedure corresponding to the old section 371. No doubt section 154 of the new Code safeguards any present right of appeal which had accrued on January 1, 1909: but section 154 does not apply here, as the right of appeal was barred by limitation at the commencement of the new Code.

*De Gruyther, K. C.*, in reply: The order against us was made on April 6, 1909, after the new Code had come into force. Till then the order in our favour, setting aside the abatement, stood. The argument that no appeal lies under the new Code fails firstly because no order was ever made under order 22 rule 4, and secondly, if there were, order 43 (k) provides an appeal. My right of appeal is preserved by section 154 of the new Code: it is a right which had accrued before that Act came into force.

Their Lordships' judgment was delivered by

July, 19.

**Lord Dunedin.**—The facts out of which this case arises are very clearly and succinctly stated by Mr. Justice Johnstone in his judgment of the 6th April, 1909, which is part of the necessary history of the judgment actually before their Lordships. He says:—"The history of this case is in brief as follows:—In 1903 His Highness Raja Balbir Singh of Faridkot brought a suit under section 283 Civil Procedure Code (1882) against Kashi Ram and Joti Mal,

decree-holders, Mr. G. H. Coates, judgment debtor, and two others, for a declaration that certain property, attached under Kashi Ram and Joti Mal's decree, was plaintiff's property, and so not liable. Great delay took place and an application for transfer of the case was made to the Chief Court; but a new District Judge having been ordered to Ferozepur, transfer became unnecessary. Again plaintiff applied for transfer of the case, and again the petition was rejected, and the case was taken up thereafter on the 21st April, 1904. In the course of the hearing on the 16th July, 1904, an application was made to the Chief Court to revise an order of the District Judge, directing a party to produce certain books. I need not go into details concerning this. Suffice it to say that the petition remained in the Chief Court till the 1st January, 1908, when Mr. Herbert, pleader for plaintiff, withdrew it, and that in the meantime certain casualties had occurred among the parties. In February 1906, Raja Balbir Singh died and was succeeded by the present chief. On the 9th May, 1906, the latter applied in Chief Court for substitution of his own name and this was ordered on the 19th May, 1906. Joti Mal, defendant 2, had also died on the 15th April, 1906, and plaintiff said he heard of this (plaintiff is a minor) on the 8th November of the same year. Application for substitution of his five sons was made on the 13th December, 1907, and, the file still being in the Chief Court, on the 11th January, 1908, the prayer was granted. These orders of the 19th May, 1906, and the 11th January, 1908, were apparently both *ex parte*.

"The papers went back from Chief Court to District Judge on the 13th March, 1908, and then an application was made to District Judge on the 16th March, 1908, by Kashi Ram, defendant 1, and Lala Achhru Ram, one of the sons of Joti Mal, praying for an order of abatement on the grounds that in none of the following cases had representatives of deceased parties been put on the record within time, viz. :—

"1. Vice Raja Balbir Singh, died February 1906; 2. Vice Joti Mal, died April 1906; and (3) Vice Mr. G. H. Coates, died about December 1906.

"The new District Judge, Captain Sanford, without enquiry and without notice to plaintiff, the present chief, and obviously without looking at the Chief Court's orders of the 19th May, 1906, and 11th January 1908, summarily there and then ordered abatement, and gave applicants costs out of the deceased Raja's estates. The order was passed under both section 366 and section 368, Civil

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Procedure Code (1882), all three grounds set forth in the petition being accepted as sound.

"Upon a petition by the present chief, Captain Sanford's successor, on the 8th April, 1908, reconsidered the *ex parte* order of the 16th March, 1908, and set aside the order of abatement in so far as it depended upon the matter of the decease of the late Raja. This was an order under section 371, Civil Procedure Code and was within the power of the District Judge. Then, on the 24th April, the District Judge, took up the other two demises, and set aside the abatement order also in respect of them. On both occasions it was urged before the District Judge that section 371 did not authorise the reconsideration by him of an order under section 368, Civil Procedure Code, but he overruled the objection."

Having thus set forth the facts, the learned Judge expressed his opinion that though section 371 authorised the setting aside of the abatement in so far as it depended on a failure to substitute a new plaintiff under section 366, it did not do so, in so far as the abatement order depended on a failure to substitute a new defendant under section 368. Accordingly, holding the District Judge Prenter's order to review to be *ultra vires*, he quashed that order and restored the *ex parte* order of the District Judge Sanford which abated the suit.

It follows from what Mr. Justice Johnstone had said, that in his opinion the proper course for the plaintiff who, by an *ex parte* order in the District Court, had had his suit brought to an end, was to appeal to the Chief Court against that order. This the plaintiff did. But on presenting his appeal he was met by the objection that it was time-barred. The case depended before the same Judge, Mr. Justice Johnstone. He upheld the objection. The case was then set down for review by the Chief Court. In that Court Mr. Justice Johnstone sat as sole Judge. He, after a careful reconsideration, not unnaturally repeated his former judgment, but gave leave to appeal to His Majesty in Council.

The sole question directly raised is whether the time which was spent in getting the District Judge Prenter's judgment, which was afterwards decided to be wrong and in getting it set aside, falls to be deducted in calculating the time during which appeal was possible. This depends on section 5 of the Limitation Act, which is in these terms :—Any appeal or application for a review of judgment may be admitted after the period of limitation prescribed therefor, when the appellant or applicant satisfies the Court that he had some sufficient cause for not presenting the appeal or making the application within such period."

It is right, also, to quote section 14 of the same Act, which is as follows:—"In computing the period of limitation prescribed for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or a Court of appeal, against the defendant, shall be excluded, when the proceeding is founded upon the same cause of action, and is prosecuted in good faith in a Court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it."

This, it will be observed, does not in terms apply, as it deals with suits and not with appeals, but its relevance will be seen by the judgments afterwards quoted.

The learned Judge, Mr. Justice Johnstone, in his first deliverance on this matter, cited the case of *Ramjiwan Mal v. Chand Mal* (1). That case laid down the broad proposition that a mistake in law never could be the foundation for an application for the indulgence which may be granted under section 5. If that were sound there would be an end of the case. Upon the assumption that review was not the proper remedy for an abatement granted in respect of section 368 (which assumption the plaintiff by acquiescing in Mr. Justice Johnstone's judgment of the 6th April, 1909, must be held to concede), the proceeding by way of review instead of by appeal was a mistake in law. But the learned Judge's attention does not seem to have been called to the fact that the case cited was really reversed by the decision of *Brij Mohan Das v. Manu Bibi* (2), where a full Bench held that a mistake in law may be the foundation for the relief craved. The case on its facts is not directly in point here, for it was concerned with a suit and not with an appeal; *i.e.* was directly under section 14; and further, the mistake made was clearly within the words "a Court which from defect of jurisdiction is unable to entertain it." In the second judgment the learned Judge carefully reconsidered the authorities. The case of *Karm Bakhs v. Daulat Ram* (3) had been specially pressed upon his attention; a Full Bench decision of his own Court which, if applicable, he was bound to follow. He refused to consider it applicable, because, in his opinion, it laid down no general rule, and each case he considered depended on its own facts.

Their Lordships find it impossible to agree with the view that the case of *Karm Bakhs v. Daulat Ram* (3) laid down no general

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(1) (1888) I. L. R. 10 All. 587.

(2) (1897) I. L. R. 19 All. 348.

(3) (1888) P. R. 478.

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rule. The case was first taken in chambers, when Plowden J., the point being raised, said "This class of cases is constantly cropping up, and some definite rule should be laid down." Following this view, when with another Judge, he took up the case in the Divisional Court, he referred the matter to a Full Bench. The case was heard before a Full Bench, and Plowden J. delivered the judgment. It will be enough to cite two passages from that judgment. After setting forth the terms of section 5 of the Limitation Act, he says:—"All that the section requires in express terms as a condition for the exercise of the discretionary power of admission of an appeal presented after time is sufficient cause for not presenting the appeal within the prescribed period. If such can be shown the Court may in its discretion, which is of course a judicial and not an arbitrary discretion, admit the appeal. We think the true guide for a Court in the exercise of this discretion is whether the appellant has acted with reasonable diligence in prosecuting his appeal, and we think further that he ought ordinarily to be deemed to have acted with ordinary diligence, when the whole period between the date of the decree appealed against, and the date of presenting the appeal does not, after excluding the time spent in prosecuting with due diligence a proper application for review of judgment, exceed the period prescribed by law for presenting the appeal."

And again—

"We also agree with the High Court of Allahabad in the case reported in I. L. R., 5 All. 591, that the circumstances contemplated in section 14 of the Limitation Act should ordinarily constitute a sufficient cause within the meaning of section 5."

These citations seem to show that there is a general rule expressed, and that the case was only sent to a Full Bench in order that some general rule should be laid down.

The learned Judge says that each case depends on its own circumstances. This is true. But he seems to treat this truism as if it was destructive of the idea that there can be a general rule. There is no inconsistency in the position. There may be a general rule as to the exercise of discretion, but each case must, nevertheless, be examined as to its own circumstances to see whether they make it fall within or without the terms of the general rule.

It would doubtless be within the power of this Board to hold that the general rule so laid down was wrong. But here it must be noticed that though as authority binding on Mr. Justice Johnstone it rests on the Punjab case, the authority for it is really much wider.

The case of *Brojender Goomar Roy* (1) was also a Full Bench case, sent to the Full Bench of Calcutta in order to obtain a general rule, and it is well summarised in the head note which runs :—  
 “If a party presents an application for review of judgment within the ordinary period limited for appealing, the time occupied by the Court in disposing of such application will not be reckoned among the days limited for appealing, but will be added thereto, and a memorandum of appeal presented within such extended period will be received as presented within time.”

And in delivering judgment Peacock, C. J., mentioned that they were upholding the ruling of fourteen Judges in 1865, and that the practice upheld had been the practice of Madras since 1860. Their Lordships were also informed that the same rule had been followed in Bombay. In Allahabad the same result is reached by combining the case *Balwant Sing v. Gumani Ram* (2) with the case *Brij Mohan Das v. Mannu Bibi* (3).

Now if the matter were entirely open, inasmuch as a mere mistake in law is not *per se* sufficient reason for asking the Court to exercise its discretion under section 5 (instances of which are given in some of the cases cited by the learned Judge), there would be a good deal to be said in argument in favour of making the rule universal, and upholding in its entirety the ruling given in the case of *Ramjiwan Mal v. Chand Mal* (4) above cited. But the matter is not open. To interfere with a rule, which after all is only a rule of procedure, which has been laid down as a general rule by Full Benches in all the Courts of India, and acted on for many years, would cause great inconvenience, and their Lordships do not propose so to interfere.

It was strenuously urged by the learned counsel for the respondents that inasmuch as the power in section 5 is admittedly a discretionary power, this Board ought not to interfere with the discretion exercised by Mr. Justice Johnstone, and he cited cases of which *Sharp v. Wakefield* (5), may be taken as a type. In reality, however, that case is against him. For it laid down that discretion there as here must be a judicial and not an arbitrary discretion. Now if the Judge who purports to exercise the discretion does so under the view that there is no general rule, when in fact there is one, if he has, to use an expression often used in another class of cases, misdirected himself as to the law to be applied to the case, he cannot exercise a judicial discretion, and the superior Court—in

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(1) (1867) 7 W. R. 529.

(2) (1883) I. L. R. 5 All 591.

(3) (1897) I. L. R. 19 All. 348 F. B..

(4) (1888) I. L. R. 10 All. 587.

(5) (1891) A. C. 173.



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this case this Board—must either remit the case or exercise the discretion themselves. In a case like *Sharp v. Wakefield* (1) there would necessarily be a remit. Here it is otherwise, for the general rule applies, and it only remains to see whether the proceedings in the review were reasonably prosecuted and in good faith. That they were so their Lordships have no doubt. The District Judge Sanford made the order for abatement on the 16th March, 1908. The plaintiff applied on the 20th March to set it aside, and it was set aside by the District Judge Prenter on the 24th April, 1908. Mr. Justice Johnstone speaks of the plaintiff “persisting” in prosecuting review after the defendants had taken the point that appeal and not review was the proper remedy. But the defendants were held by the District Judge Prenter to be wrong, and their Lordships think that the plaintiff cannot be held in any fair sense to have “persisted” in his attitude till Mr. Justice Johnstone’s first judgment of the 6th April, 1909. Accepting that judgment, he appealed on the 21st April, 1909. The question of what he did in the fifteen days is neither here nor there. For, accepting the general rule as stated above, the period for appealing being ninety days, the dates stand thus: the District Judge Sanford’s order was made on the 16th March, 1908. That order was set aside on the 8th April, 1908. Thus only twenty-three days out of the ninety had expired. That left forty-seven days. And after the proceedings for review terminated only fifteen days were consumed before the appeal was presented.

Though it is not in the appellant’s mouth to say that Mr. Justice Johnstone’s first judgment, settling that review was incompetent, is wrong, he having acquiesced therein, still as the matter has been mooted and discussed, their Lordships think it better to say that in their view the District Judge Prenter’s judgment on this point was right, and that of Mr. Justice Johnstone wrong. The point seems to their Lordships very clear. Section 365 provides for the substitution of a new plaintiff when the plaintiff has died, upon the application of the representative of the deceased plaintiff. Section 366 deals with the state of circumstances when no such application is made within a certain time. The defendant may either (1) have the suit abated; or (2) get an order putting up a new plaintiff. Section 368 deals in a similar manner with the case of the death of a defendant. Thus it will be noticed that abatement is a penalty which is only imposed on a failure of the plaintiff.

Then comes section 371. This primarily deals with what

(1) (1891) A. C. 173.

abatement involves : "No fresh suit shall be brought on the same cause of action." It is obvious that it is only a plaintiff that is hurt by this. 'Nothing could be better for a defendant. It is also obvious that an abatement is equally hurtful to the plaintiff whether granted in respect of a failure under section 366 or section 368. When section 371 goes on to say under what conditions the plaintiff can get rid of the abatement, it would be expected that it would deal with abatement however procured. And the opening words make it clear that it is so ; "When a suit abates or is dismissed *under this chapter.*" This chapter includes section 368 just as much as section 366. The learned Judge seems to think that an argument can be founded on the fact in the appeal section 588, an appeal is given against orders pronounced under section 368 and the second paragraph of section 366, but none against those under the first paragraph of section 366. The reason is apparent. Section 371 which gave review was sufficient as to abatement so far as the plaintiff was concerned ; but being a plaintiff's section only, it was unavailable to a defendant and as already pointed out, a defendant as such never would want to complain of abatement. But in paragraph 2 of section 366 and in parts of section 368, there are other matters than abatement. Under 366 paragraph 2 a defendant might bring about the introduction of a wrong plaintiff against the will of the right one ; under section 368 a plaintiff might introduce a wrong defendant. To the persons so aggrieved there is given appeal.

Though they think that Mr. Justice Johnstone's judgment on this point is erroneous, there is one remark which he makes in his opinion with which their Lordships agree, and which they wish to approve and emphasise. He points out how the whole mischief has arisen from the fact that the District Judge Sanford's order abating the suit was pronounced *ex parte* without giving the opposite party the opportunity of appearing. An order abating the suit, looking to the terms of section 371 already quoted, may be said to be really tantamount to a judgment in favour of the defendant. To pronounce such a judgment *ex parte*, when no notice has been given to the opposite side to appear and contest the order, is much the same as to decide a suit against a defendant who has not been cited to appear. The practice, if it is a practice, is quite indefensible.

Their Lordships think it better to say further, that if the defendant had been present, it is clear that no order of abatement ought to have been pronounced. The plaintiff as representative of the original plaintiff, and the defendant's representatives of Joti Lal, had been introduced in the Chief Court. No doubt that was only

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done in the course of an interlocutory application as to the production of books. But the introduction of a plaintiff or a defendant for one stage of a suit is an introduction for all stages, and the prayer, which seems to have been made *ob majorem cautelam*, by the plaintiff, in his application to the District Judge Prenter, under section 365, was superfluous and of no effect. Coates, the judgment-debtor, was only formally called, and the non-presence of his representatives would afford no ground for the abatement of the suit.

Their Lordships will therefore humbly advise His Majesty to allow this appeal, and to remit to the Chief Court to allow the appeal and to set aside the order of the District Judge Sanford, and to remit to the District Judge to proceed with the hearing of the case on the merits. The respondents will pay the appellant the costs of this appeal and in the Courts below the costs so far as the proceedings were directed to setting aside the order of Judge Sanford. The general costs of the suit will abide the result on the merits.

*T. L. Wilson & Co.*:—Solicitors for the Appellant.

*Lumley & Lumley*:—Solicitors for the Respondent A. A. Coates.

The other Respondents did not appear.

J. M. P.

*Appeal allowed.*

PRESENT: *Lord Dunsdin, Lord Shaw, Lord Sumner, Sir John Edge and Mr. Ameer Ali.*

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RAJKUMAR THAKUR GIRIDHARI SINGH

v.

MEGH LAL PANDEY AND OTHERS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT FORT  
WILLIAM IN BENGAL.]

*Land Law in Bengal—Zamindar—Mokurari—Permanent tenure—Minerals—Rights to minerals—Mokurari pottah—Effect of pottah with all rights (mai huk hakuk) and power to cut and sell trees.*

Where the proprietor of a zamindari executed a permanent heritable and transferable mokurari pottah at a fixed rent of a small portion of a village within its ambit "with all rights (*mai huk hakuk*);—appertaining to my zamindari," and

giving the mokuridar power to cut and sell the trees, held that the mineral rights were not included in the pottah, which gave the mokuridar only surface rights; and that in the absence of an express grant the mineral rights remained in the zamindar.

*Megh Lal Pandey v. Rajkumar Thakur* (1) reversed. *Kumar Hari Narayan Singh Deo Bahadur v. Sriram Chakravarti* (2), *Durga Prasad Singh v. Braja Nath Bose*, (3) and *Sashi Bhushan Misra v. Jyoti Prasad Singh Deo* (4) followed.

Appeal from the judgment and decree of the High Court at Calcutta, in *Megh Lal Pandey v. Rajkumar Thakur* (1), dated December 19th, 1906 reversing a judgment and decree of the Court of the Subordinate Judge of Manbhum, dated June 19th, 1905.

The question for determination was whether the respondents had acquired as against the appellant zamindar, rights to minerals under their *mokurari* pottah, dated the 27th Assar 1272 (10th July 1865). The Subordinate Judge held that the minerals did not pass under the pottah, but the High Court reversed that decision and held that such rights passed to the mokuraridars. The pottah was as follows :—

“I settle in mokurari the whole of, the mouzah Baramashya, with all rights as per boundaries given below, appertaining to my zamindary, the third kismat, pergunnah Nawagarh, which is in my possession, together with *bil*, *jhil*, orchards, tanks, cultivated lands, with *dangas*, *bhita* (homestead) and *jhari* (jungles) standing on the same, with the exception of the *nakh* (preserved) jungle lying to the south of the road of Jugia Bhita, and extending up to the Koruru Dobajore, which I keep in my khas possession, at an annual jama of Rs. 59 and 2 seers of ghee and one goat, and by accepting Rs. 59, as the bonus proportionate to the fixed rent of Rs. 59. You shall enjoy and hold possession of the aforesaid village with your sons and grandsons at your full bliss on payment of the said amount of rent to me every year according to the following instalments. If you do not pay the rent according to the instalments every year, the *mokarari* will be cancelled at the end of the year. You shall not get abatement of rent on the plea of inundation, drought and the land remaining waste. You shall be entitled to the extra collections which will be realized in the village and you shall take the prices of the trees of the same by cutting and selling them to which I shall not have any right. There will never be any increase in this

(1) (1906) I. L. R. 34 Calc. 358.

(2) (1910) L. R. 37 I. A. 136; 11 C. L. J. 653; I. L. R. 37 Calc 723..

(3) (1911) L. R. 39 I. A. 133; 15 C. L. J. 461; I. L. R. 39 Calc 696.

(4) (1916) L. R. 44 I. A. 46; 25 C. L. J. 265.

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rent. If I or my heirs raise any objection, the same will be disallowed. To this effect I execute this mokurari pottah on receiving Rs. 59 in cash."

*De Gruyther, K. C.*, and *Dunne*, for the appellant: A Mokufari pottah is not tantamount to a conveyance in fee simple: *Abhiram Goswami v. Shyam Charan Nandi* (1), which reversed the decision in I. L. R. 33 Calc. relied on by the High Court. The zamindar is the owner in fee and the effect of the recent decisions of the Board is that the title to the minerals is in the zamindar and not in the mokuraridar unless it is expressly shown that the zamindar has parted with it. *Kumar Hari Narayan Singh Deo Bahadur v. Sriram Chakravarti* (2), *Durga Prasad Singh v. Braja Nath Bose* (3), and *Sashi Bhushan Misra v. Jyoti Prashad Singh Deo* (4).

The High Court has also relied upon *Sriram Chakarvarti v. Hari Narain Singh Deo* (5), but that case was reversed by this Board by the decision reported in 37 I. A. 136. The expression "*mai hak hakuk*," meaning with all rights, includes as the Subordinate Judge has held, all surface rights. The English Law of conveyancing is not applicable in this case.

*Sir Erle Richards, K. C.*, and *Sir W. Garth* for the Respondents: There is a grant here which according to English Law gives the *mokuraridar* the minerals. The words of the grant pass the minerals. The cases cited by the other side can be distinguished. There was no grant in evidence in any of those cases. The Board there simply decided that they could not be asked to say that the minerals passed to the *mokuraridar* in the absence of any evidence of a grant. But here there is a grant which gives all rights, and the right to the minerals is included in them. There being no grant in evidence in those cases it was not necessary to decide there whether there is a grant in evidence, the terms of the grant must expressly give the rights to minerals. General words in the grant may include rights to minerals. The object of the grant was to pass all rights. The *mokuraridar* has the power to cut and sell trees. An ordinary lessee would not have such power. The grantee here intended to pass all his rights including the rights to minerals.

No reply was called upon.

(1) (1901) L. R. 36 I. A. 146; 10 C. L. J. 284; I. L. R. 36 Calc. 1003.

(2) (1910) L. R. 37 I. A. 136; 11 C. L. J. 653; I. L. R. 37 Calc. 723.

(3) (1912) L. R. 39 I. A. 133; 15 C. L. J. 461; I. L. R. 39 Calc. 696.

(4) (1916) L. R. 44 I. A. 46; 25 C. L. J. 265.

(5) (1905) I. L. R. 33 Calc. 54.

The judgment of their Lordships was delivered by

**Lord Shaw** :—The appellant is the proprietor of the zamindari of Pergunnah Noagarah, being Mahal No. 16 of the touzi of the Collectorate of District Manbhoom

In 1865 he executed a *mokarari Pottah* of a small portion of Mouzah Baramashya "with all rights" (this being the translation of the expression "*mai hak hakuk*") "as per boundaries...appertaining to my zamindari, the third kismat Pergunnah Nawargarh, which is in my possession." An annual jumma was fixed of 59 rupees and 2 seers of ghee and 1 goat.

It is admitted that the possession was of a permanent and inheritable character, subject to the payment of rent, failing which latter the *mokarari* "will be cancelled at the end of the year." There is also a clause as to trees in these terms :—

"You shall be entitled to the extra collections which will be realised in the village, and you shall take the prices of the trees of the same by cutting and selling them, to which I shall not have any right."

In 1903, minerals having been discovered below the surface of the land which was the subject of the *mokarari pottah*, the respondents began to work them, claiming that they had a right to do so in respect that the minerals were within the subjects of their *mokarari* lease. This claim was resisted by the appellant, who brought the present suit for injunction and damages. The appellant is the zamindar.

On the one hand, it is admitted that minerals were not expressly included within the terms of the *pottah*. On the other, that the terms were general, as above quoted, and that there was no exclusion of these minerals. The Subordinate Judge held that the *mokarari* lease did not pass the underground and mineral rights. The learned Judges of the High Court of Calcutta, on the 19th December, 1906, held that it did. They accordingly set aside the decree and judgment of the lower Court and dismissed the suit.

In their Lordships' opinion, the judgment and decree of the High Court are erroneous, and those of the Subordinate Judge fall to be restored. It is unnecessary to enter into the general question of law, as, in their Lordships' opinion, that has been conclusively and recently settled by this Board. It is unavailing to urge that the right granted by the *mokarari pottah* to the lessee is of a permanent, heritable, and transferable character, as even although this be the

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case it does not advance the question of whether the lease itself embraced within its scope the mineral rights. On the contrary, unless there be by the terms of the lease an express or plainly implied grant of those rights, they remain reserved to the zamindar and part of the zamindari.

Their Lordships refer to the judgment of the Board in *Kumar Hari Narayan Singh Deo Bahadur and another v. Sriram Chakravarti and others* (1). In the case as reported in I. L. R. 33 Cal, p. 54, a clear finding had been made which may be cited from the judgment of Pargiter, J.:—"There is no basis for holding that the underground rights have not passed as part of the tenure. To hold otherwise would be to hold that a tenant in perpetuity can never work mines, because they do not belong to his tenure; and that the landlord can never work them, because he has no reversion and no right to enter on the land for that purpose...In my opinion, the underground rights belong to permanent tenures."

This judgment was reversed by this Board, and it was held that the zamindar "must be presumed to be the owner of the underground rights thereto [that is, appertaining to the zamindari], in the absence of evidence that he ever parted with them." Their Lordships think it right to refer to this case because, in the judgment of the High Court, the Calcutta decision is referred to as if still law, this not being the case.

*Hari Naayan Singh's* case (1) was followed by that of *Durga Prasad Singh v. Braja Nath Bose* (2). This had reference to a claim for minerals underlying two mouzahs of a zamindari. The zamindar claimed them and the defendant also did so, he being in possession under a *digwari* tenure. This tenure is hereditary and inalienable, subject to the *digwar's* liability to be dismissed by the Government for misconduct. The judgment of the Board was pronounced by Lord Macnaghten to the effect "that it must be presumed that the mineral right remains in the zamindar in the absence of proof that he had parted with them."

Finally, in *Sashi Bhushan Misra v. Jyoti Prashad Singh Deo* (3), and after a review of the decisions, it was held that the grant by a zamindar of a tenure at a fixed rent does not carry a right to the minerals. In the language of Lord Buckmaster:—"These decisions, therefore, have laid down a principle which applies to and concludes the present dispute. They establish that when a grant is

(1) (1910) L. R. 37 I. A. 136.

(2) (1911) L. R. 39 I. A. 133. (3) (1916) L. R. 44 I. A. 46.

made by a zamindar of a tenure at a fixed rent, although the tenure may be permanent, heritable, and transferable, minerals will not be held to have formed part of the grant in the absence of express evidence to that effect."

On the general question, accordingly, one need not proceed further to consider the suggestion that the lessee in a *mokarari pottah* has right to the minerals by reason of the nature of such a grant. Such a suggestion stands negatived upon authority.

There are two points, however, which remain as applicable to the present case. It is said that minerals must be included because of the use of the expression *mai hak hakuk* in this *pottah*. On the assumption that the expression means "with all rights" or may be properly amplified as "with all right, title, and interest," such expressions, in their Lordships' opinion, do not increase the actual corpus of the subject affected by the *pottah*. They only give expressly what might otherwise quite well be implied, namely, that that corpus being once ascertained, there will be carried with it all rights appurtenant thereto, including not only possession of the subject itself, but it may be of rights of passage, water or the like, which enure to the subject of the *pottah* and may even be derivable from outside properties. It must be borne in mind also that the essential characteristic of a lease is that the subject is one which is occupied and enjoyed and the corpus of which does not in the nature of things and by reason of the user disappear. In order to cause the latter specialty to arise, minerals must be expressly denominated, so as thus to permit of the idea of partial consumption of the subject leased. Their Lordships accordingly are of opinion that the words founded on do not add to the true scope of the grant nor cause mineral rights to be included within it.

A second point mentioned as a specialty in the present case is the reference in the *pottah* to the trees. The lessee is given power to cut and, if he cares, to sell these; and the zamindar renounces any right in them and their proceeds. Had the *mokarari pottah*, however, been a document which by its nature gave as in property the entirety of the land both on and below the surface, such a provision with regard to the trees would be entire surplusage. The point is not of great importance, but it negatives the idea that the *mokarari pottah* can be so comprehensively viewed. Such a lease is a lease of the surface only. This is the general case to which in the present case there is alone superadded a right to the trees. The minerals are not included.

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Their Lordships will humbly advise His Majesty that the appeal should be allowed with costs here and below and the decree of the Subordinate Judge restored.

*T. L. Wilson & Co.* :—Solicitors for the Appellant.

*T. C. Summerhays & Son* :—Solicitors for the Respondents.

J. M. P.

*Appeal allowed.*

PRESENT: *Lord Buckmaster, Lord Atkinson, and Sir John Elge.*

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[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT FORT  
WILLIAM IN BENGAL.]

*Permanently settled estate—Ownership of the bed of a public navigable river—Ownership of its banks—Bengal Regulation XI of 1825—Slow accretion—Title to submerged land again left bare—Evidence—Admissibility—Survey maps made before and after 1793—Hakikat chowhuddibandi (boundary) papers—Burden of showing exact course of the river in 1793—Permanent settlement and assumptions.*

The bed of a public navigable river is the property of the Government, though the banks may be the subject of private ownership. If there be slow accretion to the land on either side, due, for instance, to the gradual accumulation of silt, this forms part of the estate of the riparian owner to whose bank the accretion has been made.

If private property be submerged and subsequently again left bare by the water it belongs to the original owner: *Lopez v. Muddun Mohun Thakoor* (1), followed.

Where the plaintiffs claimed that a large tract of land formerly under the river Ganges formed part of the permanently settled zemindari, three sets of documents were relied on, viz., firstly, a plan of a survey conducted by Major Rennel between the years 1764 and 1773; secondly, the *Hakikat chowhuddibandi* (Boundary) papers, which were returns required for 1799 and made by the owners of the zemindari and sent in to the Government; thirdly, the Government survey map made in 1859, held, that they were all admissible in evidence, and that the evidence established the plaintiffs' claim except that the bed of the river was the property of the Government.

(1) (1870) 13 M. I. A. 467.

the Subordinate Judge of Faridpur, delivered on the 30th September 1890, Exhibit 17, that, although on that occasion the plaintiffs relied upon one of Rennell's maps and the *Chowhuddibandi* papers, they succeeded in respect of such lands only as were identified with the site of their estates, as depicted on the thak and survey maps; in fact, on previous occasions, the Government has consistently released, in favour of the plaintiffs or their predecessors, such alluvial formations as were proved to be reformations on the site of their estates as depicted in the thak and survey maps, though, as pointed out by their Lordships of the Judicial Committee in *Jagadindra Nath v. Secretary of State* (1) and by this Court in *Anandahari v. Secretary of State* (2), it cannot be presumed as a matter of law that the state of things described in the thak and survey maps existed at the time of the Permanent Settlement. The claim of the plaintiffs, on the present occasion, however is of an entirely different character. They now invite the Court to ignore the thak and survey maps. Their theory is that *mouzas*, which were included in their estates at the time of the Permanent Settlement, had disappeared at the time of the thak and survey maps and that the lands now in dispute are reformations on the sites of those lost *mouzas*. For this purpose, they adopt, as the foundation of their claim, Renell's map and the *Chowhuddibandi* papers of 1797-99. Their claim in our opinion is wholly illusory. As set forth in the plaint, it is of the vaguest description. They do not give an exhaustive list of the lost *mouzas*, but name some only and then use the words "and others." The effort they have made to identify any portion of the disputed land with the supposed sites of the lost *mouzas*, has proved an impossible task; and it is a matter for surprise that the Subordinate Judge should have adopted the uncritical method of the Commissioner and made decrees in favour of the plaintiffs for which there was not the remotest foundation. The justice of this conclusion is amply supported by the significant circumstances that, if the plaintiffs were to succeed, they would recover possession of a quantity of land very much in excess of what is indicated in the *Chowhuddibandi* papers, as included within their estates at the time of the Permanent Settlement. In so far as we have been able to make the calculations, the area of the lost *mouzas* as given in the *Chowhuddibandi* papers would be approximately 5,000 bighas, whereas the lands which have been released in favour of the plaintiffs or their predecessors in 1854, 1880, 1881, 1887 and 1889 as representing the lost *mouzas* amount

(1) (1902) I. L. R. 30 Cal. 291.

(2) (1905-6) 3 C. L. J. 316.

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to 22,893 bighas. It has been suggested before us that at the time of Permanent Settlement the bigha was taken to be one of 122 cubits, whereas according to recent measurements it is one of 80 cubits. If this be accepted as correct, the bigha of 1,793 would be approximately twice the bigha of modern times. This would merely indicate that the area of the so-called lost *mousahs* might have been 10,000 bighas according to modern measurement. But the plaintiffs had previously recovered considerably more than twice that area, and they now lay claim against another 20,000 bighas. Comment upon this aspect of the case is superfluous. After anxious consideration and minute scrutiny of all available information on the record, we have come to the conclusion that there is not the remotest foundation for the claim of the plaintiffs, and that they wholly failed to establish their alleged title by reformation on the sites of lost *mousahs* or partial reformation on such sites and accretion to the reformed lands. In fact, the whole of the evidence indicates that no question of accretion could possibly arise. The changes have been so sudden and so violent, almost from year to year, that, even if the plaintiffs had established that any portion of the disputed lands was reformed on the sites of their permanently settled estates, they could not possibly have succeeded as to the remainder on the ground of accretion thereto. It is needless, however, to examine this aspect of the case, because we hold that no part of the disputed land has been shown to occupy the site of any portion of the estates of the plaintiffs. Finally, the Subordinate Judge points out that the plaintiffs have given no evidence to prove that they have acquired a good title by adverse possession. Consequently, from every point of view, the question of title must be decided against them."

*De Gruyther, K. C.*, and *E. B. Raikes* for the Appellants in the first two appeals.

*De Gruyther, K. C.*, and *Eddis* for the Appellants in the last two appeals.

*Sir Erle Richards, K. C.*, and *Sir W. Garth* for the Respondents, the Secretary of State for India in Council.

The judgment of their Lordships was delivered by

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**Lord Buckmaster:**—The river Ganges in its course through the district of Dacca rests so uneasily in its bed, that its boundaries can never at any moment be defined with the certainty that their limitation will be long observed. Frequently the river leaves its course, flows over large tracts of land, leaving other areas bare, and then again its waters recede, giving back the lands submerged

in whole or in part to use and cultivation. It is obvious that difficulties as to ownership must arise in these circumstances, and of the extent and complication of these difficulties the present case affords an excellent illustration. The general law that is applicable is free from doubt. The bed of a public navigable river is the property of the Government, though the banks may be the subject of private ownership. If there be slow accretion to the land on either side, due, for instance, to the gradual accumulation of silt, this forms part of the estate of the riparian owner to whose bank the accretion has been made. (See Regulation XI of 1825.) If private property be submerged and subsequently again left bare by the water it belongs to the original owner. [*Lopez v. Muddun Mohun Thakoor and others* (1)]. It is the latter circumstance that the appellants allege has happened in the present case, but the burden of proving the facts necessary to establish the original ownership rests upon them, and it is the difficulty of this proof, rather than the difficulty of applying the law, that has caused the differences of opinion between the Subordinate Judge and the High Court, from whom this appeal is brought.

The appellants are together entitled to two estates in the district of Dacca. The first is the *zemindari* of Patpasha, and is No. 115 on the revenue rolls, and the second is the *taluk* of Char Madhabdia, and was formerly No. 160, and is now No. 4002, on the revenue rolls of Faridpur. These estates bound a branch of the Ganges on each side at the place material to this suit, and the appellants, who are severally interested in certain undivided shares in these estates, claim that a large tract of land formerly under water forms part of their property. This claim has throughout been disputed by the Government, and to establish their rights four suits were instituted by four sets of plaintiffs, who together own the estates, the Secretary of State for India and the three other sets of plaintiffs being defendants in each suit. The Subordinate Judge decreed in favour of the plaintiffs. From this decree the Secretary of State appealed to the High Court, who set aside the decrees of the Subordinate Judge and dismissed the suits. From the judgment of the High Court the present appeals have been brought. They have been consolidated, and in speaking of the appellants their Lordships throughout intend to refer to the parties, who together formed the original plaintiffs and their representatives, and by the respondent they mean only the Secretary of State for India in Council.

Although many witnesses were called, for the purposes of this

(1) (1870) 13 Moor's Ind. App. p. 467.

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appeal, their testimony was of no real consequence ; the arguments of counsel both for the appellants and the respondent being rightly confined to the true effect of evidence furnished by three sets of documents, upon which the appellants rely, and upon certain circumstances about which there is no dispute. The first of these documents is a plan referred to throughout as "Rennel's map." This was made by Major Rennel as part of a survey which was conducted by him between the years 1764 and 1773. The respondent gives reasons for suggesting that this particular map relates to a survey made in 1764, and their Lordships, for the purposes of the present appeal, are prepared to accept that date. The map itself does not purport to give the boundaries of different *mousahs*, nor indeed to define their position with any exactness. It appears that it was prepared rather for the purpose of showing the roads and the waterways than of locating villages, and consequently the description and definition of the different places is only necessary in relation to the rivers and the roads. The next class of documents consists of certain returns known as the Hakikat Chowhuddibandi Papers. The word "Chowhuddibandi" means "boundary," and the papers may, therefore, be properly described as the boundary papers. They appear from their form to have been returns which apparently were required for the year 1799. They were made by the owners of the estates in question and sent in to the Government. Whether they were made for other years is not certain. Only those for 1799 exist. Even the exact purpose for which they were prepared is not clear, but it may be accepted that they were not voluntary. They were made on a Government form in pursuance of a Government request and to afford the Government for their purpose satisfactory information upon the various questions to which they furnish answers ; the first of these questions, after a statement of the number of *mousahs*, being as to their boundaries. The third document is the Government survey that was made in 1859, which, although it does purport to assign boundaries, does not contain such a description of the boundaries of the different *mousahs* in dispute as to enable these to be traced throughout. This is no doubt due to the fact that, at the time of this survey, the Ganges had overflowed a part of the *mousahs* mentioned in the returns of 1799, and boundaries had been obliterated. These three sets of documents afford the chief material upon which reliance can be placed. There is no copy of the Sunnud grant at the date of the Permanent Settlement, nor of the Kabulyat, nor indeed of any intermediate documents affecting the title of any kind, but this is rather the misfortune than the fault of the appellants.

All of the existing documents, including the three classes to which reference has been made, were in the custody and possession of the Government, by whom they had been carefully kept, and certainly regarded as documents of great importance. There can be no doubt as to their admissibility in evidence. The question is not whether they can be admitted to proof, but what it is they prove when they have been admitted. Most information is to be gathered from the boundary papers. These give descriptions of the different *mousahs* with their different boundaries, and, as there appears to have been no correction whatever made in the statements, and no document is forthcoming from the Government showing that the returns were questioned, they must, in their Lordships' opinion, as between the Government and the *semindars*, be accepted as *prima facie* accurate, and the boundaries so given, unless shown to be erroneous, ought to be regarded as the boundaries of the *mousahs* forming part of the estates.

Now it is true that there is nothing to show that the river had at the date of these papers remained steadily in the course where it was shown to flow in Rennel's map, and having regard to its known characteristics there is every reason to think that its channel had not remained constant.

If, therefore, the total estate as disclosed in the boundary papers had had as one of its limits a branch of the river the difficulties in the appellants' way would have been greatly increased. But in fact it is not so, for the effect of these returns is to establish that taking the two *semindaris* together there was a large estate through which the river ran from east to west, although the exact position of the river may not have been, and cannot now be, confidently located.

Dealing with the descriptions as they are given of the villages, they are said to be on the south and the north of a branch of the Ganges, called the river Padma. Dealing first with the south, these returns show that a *mousah*, called Hajinagar, ran along the south boundary of the river said to be on the east of Gopalpur, Lakhipur, and Nasibashi, in *pergunnah* Haveli; eastern boundary, on the west of Talemabad in *nij pergunnah* (i. e., in my *pergunnah*); northern boundary, on the south of the river Padma; and southern boundary, on the north of Tepakhola, Kharkhandi, Mahmudnagar, and Ujankandi, in *nij pergunnah*. The three southern *mousahs*, Kharkhandi, Mahmudnagar, and Ujankandi are themselves described with their several boundaries. Kharkhandi is stated to be on the south of Hajinagar, on the north of Sadipur, on the west of

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Maghnagar, and on the east of Tepakola and Bhajdanga. Mahmudnagar again is given by boundaries that agree with the boundaries of Kharkhandi and Hajinagar, and is stated to be on the north of another *mouza* known as Gadadhardangi. Gadadhardangi has its boundaries also given: western boundary, on the east of Sadipur in *nij pergunnah*; eastern boundary, on the west of Char Husni; northern boundary, on the south of Mahmudnagar, Ujankandi, and Sadkabad; southern boundary, on the north of Par-Aliabad in *nij pergunnah*. Taking these boundaries alone they show that from the South bank of the river down below Gadadhardangi the *mouzas* given form a compact block of separate villages, each one bounded by the other, and without room for any extraneous *mouzas* to be inserted. This is a matter of extreme importance, for the *mouza* Gadadhardangi is shown in part upon the map of 1859, but at that time the river had so completely changed its course that it had flowed over all of the *mouzas* to the north of Gadadhardangi, with the result that it was no longer possible to plot them out on the map. None the less, the map shows that one of the southernmost of all the *mouzas* was in part outside its course and enables this to be accepted as evidence of the southward extent of the estate. It is quite true that this still leaves the definition of the eastern, the western, and the northern boundaries undetermined, but the eastern and the western limits are also capable of being in like manner ascertained. Hajinagar is said to be bounded on its west by Gopalpur and Lakhipur. Now Lakhipur is in part marked out on the survey map of 1859, and it would appear from the boundaries there given that the western boundary of Hajinagar must in part at least have been beyond the area that is now in dispute. And so again with regard to Kharkhandi, the most western of the *mouzas*, that lay to the south of Hajinagar; this is said to be on the east of Tepakola and Bhajdanga. Now Tepakola, Bhajdanga, and Sadipur are all shown in the survey map of 1859, and, though it is true that in that map Bhajdanga is stated to be south of Sadipur, this does not materially disturb the western boundary of Kharkhandi, for both Tepakola and Bhajdanga and Sadipur are in the *zemindari* in question. This, therefore, builds up a contiguous collection of *mouzas* to the west; beyond the western boundary of the disputed land. Now on the east the boundary of the easternmost of the three *mouzas* that lay south of Hajinagar—namely, Ujankandi—is said to be bounded on the east by Sadkabad, and if Sadkabad were identified with another *mouza* named Hajiganj, or, if the two *mouzas* together formed the eastern boundary, there would be no difficulty, because Char Hajiganj and Char Husni are both shown

in the survey map of 1859. But, even apart from such identification, the boundaries of Sadkabad and Char Husni are consistent only with the view that the former bounded Ujankandi and the latter Gadadhardangi, and just as Gadadhardangi lay to the south of Ujankandi, so Char Husni is said to be south of Sadkabad, and it appears in the statement attached to the thak map of Char Husni that Hajiganj is also in the *pergunnah* of Patpasha, and that by order dated the 6th March, 1862, Sadkabad has been put with Char Husni without any boundary in the same *pergunnah* of Patpasha.

Without attempting to do what must now be impossible—to define the exact limits of each of these *mouzas*—this again shows that, whatever their boundaries may be *inter se*, taken altogether they constitute a block that covers the whole of the present disputed land that lies south of whatever was the line of the river in 1799.

Their Lordships have already pointed out that if the evidence went no further than this it would put the appellants in a state of great embarrassment. But when we proceed to look at the description of the other *pergunnah* on the north of the river, the Chowdhudibandi Papers show that there was a *mouzah* Ramkantapur, together with *chak* Shibnathpur and Jhaukandi, whose boundaries are given in the following words: "Western boundary—Ramkantapur in *pergunnah* Nasirsahi; southern boundary river Padmabati, Par Baghurhat, Par Hajinagar, and Hajiganj, with Bhadrasan on the straight southeast corner; eastern boundary—Char Harpatchar, and *mouzah* Harifampur; northern boundary—Mansurabad and Santoshpur, on the other side of river Bhubaneshwar." This gives the southern boundary again as the river and the northern boundary as Mansurabad and Santoshpur on the other side of the river Bhubaneshwar, another branch of the Ganges. Now in the map of 1859, a *mouzah* described as Mansurabad does in fact lie almost directly north of Hajinagar across the river, though this is very considerably to the west of the Mansurabad which is shown in Rennel's map. Their Lordships however, see no reason why they should assume that a description given of this village in the accurate survey of 1859 does not reproduce the real boundary of Ramkantapur. Further, the survey of 1859 shows another *mouzah* called Rustampur, next to Mansurabad, and in the plaints it is alleged that this name is an alias for Santoshpur, a statement not specifically denied in the defence. Again, witness No. 9 shows the *mouzah* Rustampur on a map and asserts it belongs to the plaintiffs, and there appears to have been no question asked as to its not being identical with Santoshpur. The commissioner to whom the case was referred by the Subordinate

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Judge for report states in paragraph 88 of his report, dated the 5th November, 1906, that Ramkantapur in *pergunnah* Nasibsahi is an existing *mousah*, and Harirampur is marked to the east on the map of 1859. This sufficiently identifies Ramkantapur to show that it extended northwards of the river over the disputed land. Taking, therefore, the two estates together, they show a collection of *mousahs* covering the whole of the disputed land and intersected by the river.

The case thus made is strongly reinforced by circumstances which happened in 1889. The river, which in 1859 had so changed its course as to go south over part of Gadadhardangi, had once more turned its channel northwards and thus left bare a large tract of land. To this the appellants' predecessors in title laid claim. The foundation of their claim depended upon the evidence to which their Lordships have already referred, and it was disputed by the Government on the same grounds on which they now rely. In the result the Subordinate Judge decided in favour of the appellants' contention and decreed their ownership of a large tract of land which was marked out on a map referred to in the decree.

From this decree the respondent gave notice of appeal, but this appeal was not proceeded with, and the judgment must be accepted as establishing against the respondent, not merely the ownership of the piece of land, but the proof of the essential facts which were in dispute in those proceedings and which were required as a foundation for the judgment.

The answer made by the respondent may be divided under several heads. In the first place, he says that the *mousahs* ought themselves to be capable of being traced so that it would be possible to show which in fact were the *mousahs* included in the present claim and that this admittedly has not been done. *Secondly*, he relies upon a course of dealing that has taken place between the Government and the predecessors in title of the present appellants with regard to certain lands, which, if the present case be right, undoubtedly form part of the appellants' estate, but which have been dealt with from time to time by the Government, either by settlement in favour of the appellants' predecessors in title or of third parties. *Thirdly*, he contends that the fact that the river Padma, which intersected the estate, is undoubtedly a river varying in position, throws upon the appellants the burden of showing what was the exact boundary of that river in 1793 in order to establish the limits of its bed, which in 1799 were excluded from the plaintiffs' estates. And, finally, he points to the areas given by the different

*mousahs* in the boundary papers, which are obviously insufficient to include the area claimed. Their Lordships do not think that these contentions can prevail. The first has already been dealt with. The boundaries of the *mousahs*, *inter se*, are not important for the present case, provided they are contiguous and together cover the disputed territory. The evidence as to their contiguity is, in their Lordships' opinion, established by the Chowhuddibandi papers; but apart from this, if in fact there were *mousahs* forming part of any other *zemindari* that lay between the *mausahs* to which reference has been made, evidence of this fact ought to be in the possession of the Government, and no such evidence has been produced. The next contention appears to have little weight, unless it can be used as an estoppel, and for this it is clearly not available. If the case depended upon verbal evidence, witnesses on behalf of the appellants would undoubtedly be confronted with the facts as to these previous dispositions of land for the purpose of showing that the conduct of the predecessors in title of the plaintiffs was inconsistent with the claims they set up, but such questions might admit of satisfactory answers, and the contrary cannot be assumed.

It is also urged by the respondent's counsel that when these grants were made to the appellants' predecessors they must have been in possession of materials satisfying them that their title was insecure. But this is mere conjecture, upon which no reliance can be placed. It is not even shown that the Chowhuddibandi papers were then accessible, and, even if they were, the conduct of the parties would be quite consistent with readiness to avoid dispute by accepting a grant of the lands in controversy, rather than embarking upon a tedious and costly litigation.

The question as to the river is more difficult. Pushed to its extreme it would result in this: that whenever a *zemindari* had been the subject of permanent settlement and there was any dispute as to its external boundaries, the *zemindars* would never be able to establish title to any portion of it if it happened to be traversed by a navigable river of variable course, unless they could show what were the exact boundaries of that course at the date of the Permanent Settlement. Such a conclusion their Lordships wholly reject. The object of the Permanent Settlement was to confirm the *zemindars* in their holdings at a fixed and immovable rent, and, if assumptions are made, one way or the other, they ought to proceed upon an attempt to justify the title rather than to render it insecure.

Finally, as to the areas, it is true that the Chowhuddibandi Papers purported to give exact areas, and that the total area is far

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less than the area of the land claimed, and indeed less than that which was decreed in the appellants' favour in 1890. It is of course possible that the area given in the returns, which is clearly described either as that of rent-paying lands or of *lakheraj* lands—the cultivated and the waste lands being subdivisions of the rent-paying land—may have been exclusive of large tracts of land then regarded as actually and potentially unproductive. It is not safe to speculate upon this matter. It is sufficient to say that, if in fact the boundaries are proved to include an area far greater than that referred to in the returns, such miscalculation or misrepresentation cannot defeat the title to the estate.

It remains to consider the reasons given in the judgment of the High Court, from which their Lordships feel compelled to differ. The question of the area no doubt had a material influence upon the opinion of the learned Judges. They also appear to have taken the view that it was necessary to give positive evidence by actual definition of boundaries, that all the *mouzas* constituted a compact block. The difficulties of locating the exact boundaries of each *mouza* seem to have had considerable weight in determining their judgment. They take as an illustration the boundaries of Char Husni, and it is quite true that it is impossible from that description to fix its exact boundaries. But, as already pointed out, this is a matter that is not material if there are no gaps between the boundaries of the different *mouzas*; and their Lordships think that the High Court was wrong in asking that such boundaries should be given, and they have erred in seeking exact information, which, however desirable, is not essential to the determination of the case. The following passage from the judgment illustrates the matter to which their Lordships refer :—

"Even if some idea could be formed as to the relative situation of one or more *mouzas*, it is impossible to determine their exact size and positions. The areas, no doubt, are given in the papers, but the lengths of the different sides are unknown, as also their directions. It is not even known that the different boundaries were straight lines. In fact it would be a matter of surprise if all these numerous *mouzas* had straight lines for their boundaries. The imaginary map, which was prepared in the Court, and which admittedly is open to criticism, does not profess to represent the sizes of the different *mouzas*."

These criticisms would have been formidable were the dispute one as between the owners of adjacent *mouzas*, in which case the definition of the boundaries would be essential, but they lose their

weight when once it is established that, however the boundaries run *inter se*, the *mouzahs* together cover the area in dispute. Their Lordships also think that it was unfortunate that, owing to some misapprehension of the value of the map, counsel for the appellants before the High Court do not appear to have pointed out the confirmation that their case received from the survey map of 1859. This map is, in their Lordships' opinion, of the greatest value. It shows Gadadhardanga and Aliabad, which formed part of the appellants' estate, far south of the land in dispute; it shows Lakhipur again to the west of the land in dispute, and shows Char Husni and Char Hajiganj to the east, with Mansurabad and Rustampur to the north. If Rustampur be the same as Santoshpur—and their Lordships think it must be so regarded—all these are boundaries of different *mouzahs* shown in the Chowhuddibandi papers, and the map of 1859 is therefore confirmation of an essential part of the appellants' contention, namely, that, whatever may be the internal divisions of other *mouzahs*, taken altogether they cover the disputed land.

There remains the question of what part of this land is to be assigned to the bed of the river, which is the property of the Government. It is a question of great difficulty. Rennel's map is undoubtedly, both owing to its difference in scale, to the different purpose of its preparation, and to the difficulty of assigning fixed points from which the survey was made, a map which it is hard to incorporate into the survey of 1859. And, again, the variability of the river renders reliance upon it difficult. As has been already said, their Lordships are not, however, prepared to dispossess the appellants because of this difficulty. It may be that any assumption that can now be made cannot be exact, but some assumption is necessary. They think upon the whole that the right course to follow is that taken by the surveyor of experience to whom this matter was referred by the Subordinate Judge, namely, to adopt the position of the river as shown on Rennel's map, and to adapt that map as far as possible to the conditions now known to exist.

This view is not contrary to that expressed in *Maharaja Jagadindra Nath Roy Bahadur v. The Secretary of State for India in Council* (1), where it was held by this Board that dry lands shown by thak or survey maps to have formed at the date of their preparation part of the bed of a public navigable river cannot be assumed to have been dry in 1793. Their Lordships there state that it is impossible to assume "that in 1793 a state of things existed different

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from what appears from any evidence before the Court." The respondent relies on this case, but it is, in their Lordships' opinion, of slight assistance to him, for the Chowhuddibandi Papers conclusively show that, wherever the exact course of the river was in 1793, it could not have occupied its site as shown in 1859, and this is the foundation of the judgment given in 1890; on the other hand, the case might be used to support the argument that the land shown to be dry in 1764 cannot, in the absence of evidence, be assumed to have been under water in 1799.

Their Lordships therefore find themselves unable to agree with the judgment of the High Court, but they also are unable to accept the reasoning of the Subordinate Judge which led him to decree the bed of the river as having by accretion become part of the two estates. There is in their opinion no evidence to support this conclusion, and, in the absence of evidence, no circumstance to justify such an assumption.

Subject, therefore, to the declaration that the bed of the river as shown on the map made by the Commissioner is the property of the Government, their Lordships think that the appellants have established their title to all the rest of the disputed land.

From this it follows that the decrees of the Subordinate Judge need only to be varied by excluding from the declaration in favour of the plaintiffs the strip of land which formerly formed the bed of the southern channel of the River Padma according to Rennel's map, as plotted on the map prepared by the Commissioner and filed in the case. Their Lordships have not before them the material that will enable them to make this alteration, and the case must therefore be remitted to the Subordinate Judge that this may be done. It is necessary that this land should be identified by means of a map, which must form part of the Subordinate Judge's decrees. Their Lordships think it right to express their desire that such alteration may be effected as promptly as possible, and that no further time should be lost in concluding a litigation the progress of which has already been too long delayed. It is now seventy years since Lord Macaulay pointed out that the delay in Indian litigation constituted a reproach to our administration, and their Lordships feel with regret that this reproach has not been taken away. A period of fifteen years is needlessly long for the determination of any suit, and more than that period has elapsed since the plaints in these proceedings were issued.

With regard to the costs, the appellants are entitled to them both here and in the Courts below. Up to the time when the consolidation

order was made, there will be separate sets, but after that date only one will be allowed.

Their Lordships will humbly advise His Majesty in accordance with this view.

*T. L. Wilson and Co.* :—Solicitors for the Appellants in the first two appeals.

*Sanderson, Adkin, Lee and Eddis* :—Solicitors for the Appellants in the last two appeals.

*Solicitor, India office* :—Solicitor for the Respondent the Secretary of State for India in Council.

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*Appeals allowed.*

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## ORIGINAL CIVIL JURISDICTION.

*Before Sir Lancelot Sanderson, Knight, Chief Justice, and  
Sir Asutosh Chaudhuri, Knight, Judge.*

### IN RE AN ADVOCATE.\*

*Professional etiquette—Counsel accepting brief from litigant—Counsel selecting another counsel to be briefed with him.*

There is no rule of law to prevent a litigant from instructing counsel directly, or to prevent counsel so instructed from appearing on behalf of a litigant; but a judicial opinion has been expressed that it is expedient in the interest of suitors and for the satisfactory administration of justice to adhere to the usage which requires that counsel should not accept a brief in a civil suit from any one but a solicitor. The exact scope of the usage is not very clearly defined, but it extends to all civil contentious business and to all criminal business except what is known as a 'dock defence.' It does not extend to the preparation of a will, to work before Parliamentary Committees or to inquiries under the Local Government Act, the Public Health Acts, or the Light Railways Act. A barrister may advise in non-contentious business without the intervention of a solicitor, though the practice has been stated to be undesirable.

A counsel engaged in a case should not select another counsel to be briefed with him.

Complaint against an Advocate.

The material facts appear from the judgment of the learned Chief Justice.

The petitioner in person.

\* Rule issued in the matter of an Advocate.

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*In re* An Advocate.

June, 14.

*Messrs. Eardly Norton, H. D. Bose, S. K. Mullick and A. Rasul*  
for the Advocate.

The judgments of the Court were as follows :

**Sanderson, C J.**—In this case we have considered the complaints which have been made against the Advocate. After reading the affidavits we thought it necessary that we should further enquire into the matter, more especially with regard to two questions, namely, the circumstances under which the work was originally undertaken by the Advocate, and the alleged non-return of his fees when he was unable to conduct the case in Court. Accordingly, we held the further enquiry yesterday.

With regard to the first question we are of opinion that there is no need for any further action by the Court.

I take the account which is given by the Advocate himself in his affidavit, paragraph 2 ; after setting out that the petitioner was introduced to him at his house by one Mrs. Neil, and pointing out that the petitioner told him that he had a claim against the Uncovenanted Service Family Pension Fund, he goes on to say that : "He further told me that considerable correspondence extending over 10 or 12 years had taken place with the authorities of the said Fund and he requested me to peruse the whole volume of correspondence and other papers and documents in connection with the matter and to advise him how to proceed. That, thereupon, he made over to me a very heavy file of papers and I demanded from the petitioner a fee of Rs. 500 for perusal and opinion in anticipation of any course I might advise him to pursue, whereupon the petitioner paid me Rs. 100 on account on that occasion, and a further sum of Rs. 100 on or about the day following." Further money was paid afterwards, but not amounting to Rs. 500, and it does not affect the point that I am now considering. I think it unfortunate that the Advocate did not follow the well-known custom and ask that he should be properly instructed by an attorney. The advice of the Advocate was sought with a view to civil proceedings being taken. The custom to which I have referred is well-known, and is stated in Lord Halsbury's book (*The Laws of England*, Vol. II, page 389), as follows :—"The usage and etiquette of the profession of a Barrister require that in all but some exceptional cases counsel should not undertake any professional work as regards which the relation of counsel and client can arise except on the instructions of a solicitor." That, as we were informed yesterday, will not apply literally to the Appellate Side, where counsel are instructed sometimes either by a vakil or a mukhtear or

•• in some cases by an attorney. "There is no rule of law to prevent a litigant from instructing counsel directly, or to prevent counsel so instructed from appearing on behalf of a litigant ; but a judicial opinion has been expressed that it is expedient in the interests of suitors and for the satisfactory administration of justice to adhere to the usage which requires that counsel should not accept a brief in civil suit from any one but a solicitor. The exact scope of the usage is not very clearly defined, but it extends to all civil contentious business, and to all criminal business except what is known as a 'dock defence.' It does not extend to the preparation of a will, to work before Parliamentary Committees, where counsel may appear when instructed by Parliamentary Agents who need not be solicitors, or to enquiries under the Local Government Acts, the Public Health Acts, or the Light Railways Act ; at such inquiries counsel may be instructed by clerks to local authorities who are not solicitors. A Barrister may advise in non-contentious 'business without the intervention of a solicitor, though the practice has been stated to be undesirable" The rule stated in Mr. Belchamber's Book "Practice of the Civil Courts" page 8, to which the learned Advocate-General referred us yesterday, is as follows :— "The usage that counsel should take their instructions only from attorneys is beneficial and, though founded upon no rule of law, ought to be maintained." The learned Advocate-General, when asked whether the course which the Advocate adopted, as set out in paragraph 2 of the Advocate's affidavit to which I have referred could be said to be in accordance with the custom here, said that according to his experience it was not so, and it should not have been done. The above-mentioned usage is a most beneficial one from the point of view of the public and the bar : and, if it had been followed in this case, much of the trouble which has arisen would have been avoided. At the same time, I do not think that in this case the complainant was prejudiced for though the fee demanded was a large one, namely, Rs. 500 for perusal of the papers and opinion, the full amount was not paid, and it is alleged that there was a large volume of correspondence and other documents which had to be looked into ; and, apparently, the Advocate took considerable trouble over the matter.

As regards the second question, it appears that the Advocate accepted the brief marked 7 G. Ms.—4 and 3—containing instructions for him to appear at the trial on behalf of the complainant sometime in March 1916. The Advocate alleges, he had to go to Hazaribagh on an urgent professional call, and before he left Calcutta he return-

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ed his brief to the attorney with his notes. He did not, however, return his fees. He had had the consultation and he claimed to have earned the consultation fee of 3 G. Ms. marked in the brief. In my opinion, he should have returned the whole fee of 7. G. Ms. It was given to him for the purpose of attending the trial, and this consultation was held with a view to his so doing : and if he could not attend the trial, another counsel would have to be briefed and a further consultation with the second counsel would be necessary for which, the client would have to pay. Under the advice of his counsel, the Advocate has now offered to return the fee of 7 G. Ms., and I think he should do so.

Copies of certain letters were produced by the attorney. These letters are alleged to have been written by him to the Advocate at Hazaribagh. The Advocate denies having received them and he denies the statements contained therein. I accept his statement. If he had received these letters and if the facts alleged therein were proved, I should have taken a much more serious view of the matter. I think he should have returned his fees when he found he could not attend to the case without being asked so to do : especially, as he must have known that the complainant was not a man in affluent circumstances and that the non-return of the fees might place him in a difficulty. Fortunately, however, another counsel took up the case for Mr. Chill and conducted it for him so that in the end his interests did not suffer. The conduct of the Advocate with regard to this part of the case cannot be regarded with anything but disfavour : but having regard to the circumstances of the case, which I have mentioned, I do not think it necessary for the Court to take any further steps. Consequently, in my opinion, this Rule ought to be discharged.

I wish to add a word about a matter which has nothing to do with this case, but it is a matter of general importance to the profession. It cropped up during the course of the hearing with reference to a passage in the affidavit of the Advocate in paragraph 11, in which he says "I made over my brief with all the notes I had prepared for my own use to the attorney when I left Calcutta, and I state that I had no hand in the selection of my junior," I happened to pass a remark about that ; and, thereupon, one of the learned counsel alleged that it was by no means an unknown or uncommon practice for one counsel to select another counsel to act with him in the case. I should be very sorry to believe that this is so. I do not refer of course to a learned counsel holding a brief for another when he is temporarily unable to attend to a case. That is

a very different matter. What was suggested was that a counsel already engaged in a case selected the other counsel who should be briefed with him. If such a thing has been done, I think that it must have been on comparatively rare occasions: such a practice is contrary to the traditions of the profession, and it is also contrary to the best interest of the profession, and such a practice ought to be, and I feel sure would be, discouraged by all who have the interests of the profession at heart.

**Chaudhuri, J.**—I concur, but I want to add a few words in respect of one of the charges in this case, which was that the Advocate concerned had nominated his junior. Mr. Norton stated that it had become a somewhat frequent practice at the Calcutta bar, for seniors to name their juniors, and he also said that juniors sometimes nominated their seniors and that in fact his name had once been struck out by a junior member of the bar. This is a very serious matter, but as Judges of the Court, we can hardly do anything in our judicial capacity, to prevent such gross breaches of the rules of the bar. What was stated to us implied that work was thus being kept within a circle. The matter being mentioned to the Advocate-General, he agreed that it was reprehensible conduct, and assured us that he would take immediate action if the matter was brought to his notice. There is always great reluctance to bring these unpleasant matters to the surface, but I think the bar owes it to itself to take action in these matters. The Calcutta bar has justly prided itself on its strength and independence, and I appeal to it to see that its high position is always maintained. Work naturally gets into the hands of a limited circle and there is nothing improper, and it is quite legitimate, for a senior to ask a junior to hold a brief for him, but to form a group is entirely improper. I feel that any attempt to form such a group should be discouraged by the bar. Mr. Norton's name being struck out by a junior shows, not only that a bar rule was broken, but also want of respect for senior members of the profession. We honoured them when we were at the bar. The respect we show to our seniors, results from the feeling of respect one ought always to have for one's profession. I worked as a member of the Calcutta bar for over 25 years. Its interest and welfare are almost personal questions to me. Although I am now sitting as a Judge, I feel I am a member of the Calcutta bar, and I hope my appeal to them will not be in vain.

I am glad to say the charge made in this case has not been substantiated. I regret to say that the Day Book of the attorney in

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this case does not inspire the confidence such a document deserves, and I hope the attorney will take note of the fact and improve his methods of work.

The petitioner in person.

*H. C. Bannerjee* :—Attorney for the Advocate.

A. T. M.

*Rule discharged.*

## CRIMINAL REVISION.

*Before Mr. Justice Teunon and Mr. Justice Richardson.*

CHARLES HENRY BROOKE

v,

KING-EMPEROR.\*

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*June, 7, 12.*

*Calcutta Police Act (IV B. C. of 1866), Sec. 66, Sub-sec. (4a)—Building contractor unloading bricks in the footpath—Portion occupied with bricks not fenced—Calcutta Municipal Act (III B. C. of 1899), Sec. 559 Sub-Sec. (18)—Bye-law, infringement of.*

When a person in the course of building operations unloaded and deposited bricks on the footpath or pavement in front of the premises, in contravention of bye-law framed under the provisions of section 559, sub-section (18) of the Calcutta Municipal Act, and thereby caused obstructions in or on the footpath for a period of some six hours or more, his offence falls within the provisions of section 66, Sub-section (4a) of the Police Act.

Application for Revision.

The petitioner was convicted under section 66, clause 4 (a) of the Police Act and sentenced to pay a fine of Rs. 20.

The material facts appear from the judgment.

*Babu Manmatha Nath Mukerjee* for the Petitioner.

*Mr. Camell* for the Crown.

C. A. V.

The judgment of the Court was delivered by

*Teunon, J.*—In this case the petitioner has been convicted under section 66 of the Calcutta Police Act (Bengal Act IV of 1866), section 66, sub-section (4a) and sentenced to pay a fine of Rs. 20.

\* Criminal Revision No. 558 of 1917, against an order of Mr. K. B. Das Gupta, 4th Presidency Magistrate of Calcutta, dated the 20th April, 1917.

*June, 12.*

It appears that the petitioner is a building contractor and has under-taken the erection of a masonry or brick building at premises No. 40-1 on the Strand Road. In the course of his building operations on the 20th of March last the petitioner unloaded and deposited some 2,000 bricks on the footpath or pavement in front of said premises and thereby, it has been found, caused obstruction in or on the footpath for a period of some six hours or more.

That the footpath or pavement in question is part of a public thoroughfare, and that obstruction was caused in the manner set out has not been disputed and the defence is that the acts complained of, having been done in pursuance of and in conformity with a license granted by the Chairman of the Corporation of Calcutta, the petitioner had not thereby committed any offence. The present rule was issued in order to the further examination of that defence.

The license which we have now examined is one granted under the 2nd of the bye-laws framed under the provisions of section 559, sub-section (18) of the Calcutta Municipal Act and authorises the licensee "to make an enclosure in (a) portion of the public street measuring 40' x 4' = 160 sq. feet for the purpose of depositing mortar, bricks etc...during the building.....of premises No. 40-1.".....

We further find endorsed on the license a condition to the effect that the license is granted on condition that the portion to be occupied must be fenced off with a temporary fence.

It is conceded that in this case there was no enclosure or surrounding fence and the first contention before us then is that inasmuch as the corporation have authorised the occupation by the petitioner of a certain specified area of the footpath it was immaterial whether he left the bricks lying loose on that space, or surrounded and enclosed the space and the bricks by means of a fence.

In the alternative it is contended that the petitioner has at most committed a breach of the bye-law under which his license was granted and that proceedings should have been taken against him only under the Municipal Act and at the instance of the Corporation.

On the other hand it is suggested by the Deputy Legal Remembrancer that in view of the provisions of section 66 sub-section (4a) of the Calcutta Police Act, the license and the bye-law under which it was granted should be held to be invalid and *ultra vires* of the Corporation.

In support of the petitioner's contentions reference is made to the provisions of section 336, section 354 and of section 559, sub-section (18). These sections and sub-section vest the public streets in the Corporation and authorise the General Committee to discontinue or

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close such streets, and to make bye-laws prohibiting or regulating the placing of obstructions, or the depositing of materials thereon.

We are however unable to accede to either of the petitioner's contentions. The petitioners' license authorised him to obstruct the pavement or footpath by a well defined enclosure but did not authorise him to obstruct or endanger the safety of persons using the footpath by means of loose and unprotected heaps of bricks. The petitioner, therefore, it is plain, has committed a breach of the bye-law under which his license was granted, but his offence also falls clearly within the provisions of section 66, sub-section (4a) of the Police Act, and he is not protected by his license; there is no reason why those provisions should not be applied.

The suggestion made by the Deputy Legal Remembrancer appears to involve the further contention that sub-section (4a) introduced into section 66 of the Police Act by the amending Act of 1910 (Bengal Act III of 1910) overrides or repeals the provisions regarding the regulation of obstructions to be found in the Calcutta Municipal Act. As in the present case the petitioner's conduct was not within his license on which he relies, we need not definitely decide the point but we may say that as at present advised we are of opinion that if by the Amending Act of 1910 the Legislature had intended to repeal any portion of the Calcutta Municipal Act such repeal would have been effected by express provision.

For the reasons given this Rule is discharged.

A. T. M.

*Rule discharged.*

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Agreement to Surrender—*Expropriatory rights—Sale of metal—North Western Provinces Tenancy Act, Sections 10, 20, 83.*

The policy of the North-Western Provinces Tenancy Act, is to secure and preserve to a proprietor, whose proprietary rights in a mahal or in any portion of it are transferred otherwise than by gift or by exchange between co-sharers in the mahal, a right of occupancy in his *sir* lands, and in the lands which he has cultivated continuously for twelve years at the date of the transfer, and such right of occupancy is by the Act secured and preserved to the proprietor, who becomes by a transfer the ex-proprietor, whether he wishes it to be secured and preserved to him or not and notwithstanding any agreement to the contrary between him and the transferee. That policy of the Act is not to be defeated by any ingenious devices, arrangements, or agreements between a vendor and a vendee for the relinquishment by the vendor of his *sir* land or land which he has cultivated continuously for twelve years at the date of the transfer ; for a reduction of purchase money on the vendor's failing or refusing to relinquish such lands ; or for the vendor being liable to a suit for breach of contract on his failing or refusing to relinquish such lands. All such devices, arrangements, and agreements are in contravention of the policy of the Act and are contrary to law and are illegal and void, and cannot be enforced by the vendee in any Civil Court or in any Court of revenue : *Ikram-Ullah Khan v. Moti Chand* affirmed, *Moti Chand v. Khwaja Ikram Ullah Khan*

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Alienation—*Hindu Law—Mitakshara—Joint family property—Father's power of alienation—Mortgage or sale for an antecedent debt—Antecedent debt—Mortgage of joint family property by father—Liability of sons in suit to enforce such a mortgage—Pious obligation of sons to discharge their father's debts only arises on father's death—Legal necessity—Burden of proof.*

Under the law of the Mitakshara the joint family property, which is owned by all the members of the family as co-parceners, cannot be the subject of a gift, sale or mortgage by one co-parcener except with the consent, express or implied, of all the other co-parceners. Any deed of gift, sale or mortgage granted by one co-parcener on his own account of or over the joint family property is invalid; the state is wholly unaffected by it, and its entirety stands free of it.

The father, in his capacity of manager and head of the family, is at liberty to affect or dispose of the joint family property for estate or family, necessity, but otherwise he has no power of sale or mortgage except for an antecedent debt. The father's power of affecting or disposing of the joint family property for necessary purposes, is analogous to that of the power vested in the head of a religious endowment or *math*, or of the guardian of an infant family. In all of the cases where it can be established that the estate itself that is under administration demanded, or the family interests justified, the expenditure, then those entitled to the estate are bound by the transaction. Where estate or family necessity exists, that necessity rests upon the co-parceners as a whole, and it is proper to imply a consent of all of them to that act of the one which such necessity has demanded.

A borrowing made on the occasion of the grant of a mortgage is not such an antecedent debt. The exception applies only to the case where the father's debt has been incurred irrespective of the credit obtained from the joint family property. In order to validate a mortgage for an antecedent debt not only antecedency in time but real dissociation in fact is required.

The obligation of religion and piety which is placed upon sons and grandsons under the Mitakshara Law, to discharge their father's and grandfather's debts, does not attach while the said father and grandfather are alive.

The doctrine of *onus probandi*, in cases where legal necessity is alleged, is largely based upon the necessity of protecting the rights of third persons who have taken their title for onerous consideration and in good faith. There is no hard and fast rule, and the presumption proper to be made must depend on the circumstances of each case. In the present case, where the mortgagees sued after 27 years, nothing having been done on the mortgage in the interval, the *onus* of proving legal necessity was laid on plaintiffs, mortgagees: *Chandradeo Singh v. Mata Prasad* approved.

*Sahu Ram Chandra v. Bhup Singh.* ...

Alienation by co-parcener, effect of—joint family property—Mitakshara law;  
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| Appeal— <i>Civil Procedure Code (Act V of 1908), Sec. 47, O. 47, R. 1—Order dismissing application for restoration of execution case.</i> |     |

In execution of a rent decree, a certain holding was advertised for sale. Subsequently a petition was filed purporting to be made by the decree-holder, certifying that he had received payment in full and praying for dismissal of the execution case on full satisfaction. The decree-holder afterwards put in a petition praying that the order of dismissal should be cancelled on the ground that the certificate filed was a forgery and that the execution case should be allowed to proceed. The petition was rejected. The application purported to be made under order 47, rule 1 of the Code of Civil Procedure and the Court's order was passed under that order :

*Held*, that an appeal lay under section 47 of the Code of Civil Procedure against the order dismissing the application. *Jaggannath Mandal v. Jaladhar Mandal* ... ..

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—*Order dismissing execution proceeding—Attachment in execution of decrees of different Courts—Civil Procedure Code, secs. 47, 63.*

A property belonging to a judgment-debtor was attached at the instance of two judgment-creditors by the District Judge as also by the Subordinate Judge. The Subordinate Judge, having regard to the provisions of section 63 of the Code of Civil Procedure, then declined to proceed with the application of the judgment-creditor for sale of the property, and being of opinion that such proceedings should be taken in the Court of the District Judge, dismissed the execution case pending on his file :

*Held*, that the order passed by the Subordinate Judge was one relating to execution within the meaning of section 47 of the Code of Civil Procedure, and as such was appealable. *Surendra Nath Biswas v. Shyama Charan Mandal* ... ..

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—*Order granting review—Civil Procedure Code (Act V of 1908), O. 47 R. 7—Appellate Court, if can entertain question as to sufficiency of evidence—Review on the ground of discovery of new evidence, when to be granted—Appeal on question of fact.*

Under rule 7 of order 47 of the Code of Civil Procedure, an order granting an application for review may be attacked by way of appeal, on the ground that the application has been granted on the ground of discovery of new evidence without strict proof of the allegation of the applicant that such new evidence was not within his knowledge or could not be adduced by him when the decree was passed.

Where the trial Judge in the exercise of his discretion, granted a review, it is not open to the Court of appeal to consider the question of the sufficiency of proof, at the instigation of the appellant. That Court is limited to the consideration of the question, whether there was strict proof, that is, proof according to the formalities of law, of the allegation.

## Appeal—(Contd.).

- A review may be granted, if new evidence, which could not have been obtained before, has been discovered which, if it had been adduced at the trial, would have been conclusive so that the verdict must have been found otherwise than it was.

It is not safe for the appellate Court to base its conclusion upon a mere comparison of handwriting without proper materials on the subject.

In an appeal upon a question of fact where the trial Judge has heard and seen the witnesses and has come to a conclusion upon the question of fact upon the evidence on the one side and on the other, there is a very great *onus* upon the shoulders of the appellant when he comes to the appellate Court and asks it to over-rule the decision of the learned Judge upon the question of fact.

*Per Sandersen, C. J.*: There should be some finality in the trial of cases, and the greatest care ought to be exercised in granting a review, when that review is asked for upon the allegation that fresh evidence has been discovered since the judgment was given.

*Per Mookerjee, J.*: Order 43 rule 1 cl (w) should be read as controlled by rule 7, order 47 of the Code of Civil Procedure. *Nundo Lal Mullick v. Panchanon Mukherjee* ... ..

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— *Order in execution proceeding—Specific Relief Act (I of 1877), decree under—Review—Jurisdiction—Civil Procedure Code (Act V of 1908), Sec. 151.*

No appeal lies against an order passed in execution of a decree made under section 9 of the Specific Relief Act.

The term 'suit' in section 9 of the Specific Relief Act, includes an execution proceeding on the basis of a decree.

Where there is an inherent incompetency in a Court, no consent can confer upon the Court that jurisdiction which it does not possess.

It is a patent misapplication by a Court of section 151 of the Code of Civil Procedure, if the Court, in the exercise of its inherent power, assumes jurisdiction by way of review where it was expressly forbidden by the legislature to entertain such an application. *Kanal Lal Ghose v. Jatindra Nath Chandra* ... ..

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— on question of fact; *See Appeal* ... ..

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| When a person in the course of building operations unloaded and deposited<br>bricks on the footpath or pavement in front of the premises, in contra-<br>vention of bye-law framed under the provisions of section 559, sub-sec-<br>tion (18) of the Calcutta Municipal Act, and thereby caused obstructions<br>in or on the footpath for a period of some six hours or more, his offence<br>falls within the provisions of section 66, Sub-section (4a) of the Police<br>Act. <i>Charles Henry Brooke v. King-Emperor</i> ... | 610   |
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**Contempt of Court—(Contd.)**

*Judge with presumptuous tyranny—Criticising the acts of a public man—Unjust and defamatory imputations on a Judge—Discretion as to punishment for contempt—Proper apology—Punishment, mitigation of.*

It is incumbent upon Courts of justice to preserve their proceedings from being misrepresented; and the minds of the public should not be prejudiced against persons concerned as parties in causes before the cause is finally heard. The misrepresentation need not be wilful.

Feigned names have been construed a libel upon those persons who were really meant to be libelled.

Whether a libel be public or private, the only method is to proceed at law; and the Court has no cognizance, unless it is a contempt, by being an abuse of its proceedings.

A man has no right to vindicate his own character by reflections upon the character of another based upon false statements and wilful suppression of the truth.

The power of committal is given to Courts of justice for the purpose of securing the better administration of justice. Every writing, letter or publication which has for its object to divert the course of justice is a contempt of the Court. It is for that reason that publications of proceedings which have already taken place, when made with a view of influencing the ultimate result of the cause, have been deemed contempt. Every insult offered to a Judge in the exercise of the duties of his office is a contempt; but when the writing or publication proceeds further, and when, not by inference, but by plain and direct language, a threat is used, the object of which is to induce a judicial officer to depart from the course of his judicial duty, and to adopt a course he would not otherwise pursue, it is a contempt of the very highest order.

A Court of record has power to punish, by commitment for contempt, a libel published while the Court is not sitting.

A printer and publisher of a newspaper is as much liable in point of law to be punished for contempt as the author who sent the libellous writing to the editor. The Court has its election to punish both the author and publisher of the newspaper, or either of them.

If the printer of a newspaper publish a letter with the name of an author attached to it, he must bear the responsibility if he is unable, when required, to prove that it was published with the authority of the person by whom it purports to have been signed.

If a printer prints anything that is libellous, it is no excuse to say that he had no knowledge of the contents.

If a printer publishes defamatory and contemptuous libels sent to him for publication by a gentleman beyond the jurisdiction of the Court, or libels published in another paper beyond the jurisdiction, or if a printer refuses to give up the name of the real author of the libel, his case is different from that of a printer who, having committed an error, apologizes and gives up the name of the author.

**Contempt of Court—(Contd.).**

In a contempt proceeding, there are two modes of proceeding open to High Court; one by a rule calling upon the person to show cause why he should not be adjudged guilty of contempt of Court; the other by attachment.

An attachment is a process that issues at the discretion of the Judges of a Court of record against a person for some contempt for which he is to be committed, and may be awarded by them upon a bare suggestion, or on their own knowledge, without any appeal, indictment, or information.

To charge a Judge with presumptuous tyranny for the mode in which he is proceeding in a matter pending before him, or to publish anything respecting that matter whilst it is under consideration, with a view to induce the Judge to alter his course, is a grave contempt of Court.

It is a high and serious offence to cast unjust and defamatory imputations on a Judge. Judges are subject to be criticised, but they must be protected from unfounded defamation.

If a person undertakes to criticise the acts of a public man, he must take care not to assert that which is not true as the basis of his criticism, and he is bound not to conceal wilfully anything which would show that the criticism is not well-founded.

Discretion as to punishment for contempt of Court depends upon the facts of each particular case.

It is a mitigation of the printer's offence, if he will discover the person who brought the paper to him.

A proper apology may mitigate, but cannot wholly excuse or justify, or form a ground for a total exemption from punishment.

*Query:* Whether a commitment for contempt could be 'until further orders' which might amount to imprisonment for life. In the matter of William Tayler ... ..

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*Jurisdiction—High Court—Contempt not committed in Court—Contempt pending suit—Advertisement for demonstration against Judge—Fair criticism—False statements sent to press—Apology—Immunity from punishment—Indian Penal Code (Act XLV of 1860), Sec. 499, Except, 2—'Opinions in good faith.'*

The High Court has power to proceed by way of contempt in a Court sitting in its Original Civil jurisdiction and not on the Crown side of the Court, even when the contempt is not committed in Court or during the pendency of a suit.

If the contempt is one which does not come under the provisions of the Indian Penal Code, there is nothing to prevent the High Court dealing with it as a contempt and if it is contempt punishable under the Penal Code, the Court can try it itself, but upon the understanding that the punishment to be inflicted, will in no case exceed that provided in the Penal Code.

Any fair criticism is justifiable and is not a contempt, if expressed in good faith.

**Contempt of Court—(Contd.).**

- An expression of opinion in good faith is a criticism.

If anonymous letters are sent to the press containing false statements, the press is responsible for them if the name of the author is not given up.

False statements published in newspapers are not fair criticisms.

No one has a right of appeal to the press by bringing false accusations founded on wilful mis-statements.

Advertisement for a demonstration against a Judge for acts done in Court, is a contempt.

A man cannot claim immunity from punishment from the fact of having made an apology for his offence.

The expression 'opinions in good faith' in Exception 2 of section 499 of the Indian Penal Code, means that in order to express an opinion in good faith, the person who holds it must have taken care and attention in forming it. In the matter of Banks and Fenwick ... ..

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*Newspaper article—Interpretation—Meaning and intent—Scandalous attacks on Judges—Attack on Judge with reference to cause to be tried—Court of record—High Court—Power to punish summarily—Publication of libel on Court or on the Judges—Proceedings, true nature of—Civil or Criminal in character—Civil and criminal contempts, distinction between.*

It is incumbent on Court, in all cases, to consider the general tone of the writing. The meaning and intent are to be determined by a fair interpretation of the language used and are matters of law for the Court as to whether or not they constitute contempt. Disclaimer on the part of the publisher as to any intentional disrespect to the Court is consequently not a sufficient defence, when the purpose and meaning of the writing is obviously of a contrary import. If the language is fairly capable of an innocent interpretation, the Court will not be astute to read into it a similar import. But if the intent is fairly clear, liability to punishment for contempt of Court cannot be successfully made by the use of a transparent artifice.

Contempt by speech or writing may be by scandalising the Court itself or by abusing parties to actions or by prejudicing mankind in favour of or against a party before the cause is heard.

The High Court in the Indian Presidencies are Supreme Courts of record.

The High Court has power to punish summarily a contempt of Court committed by the publication of a libel on the Court or on the Judges, when the Court is not sitting.

The printer and publisher of a newspaper is liable for contempt even though he was not aware of the subject constituting such contempt.

*Sanderson, C. J.* : The jurisdiction which the Court has in respect of a contempt of Court should be exercised with great care and should only be exercised when the case is beyond all reasonable doubt, and this should especially be the case when the proceedings are at the instance of the Court itself.



**Contempt of Court—(Contd.).**

*Per Mookerjee, J.* : Scandalous attacks upon Judges calculated to cause an obstruction to public justice, constitute contempts of Court. Punishment is inflicted for attacks of this character upon Judges, not with a view to protect either the Court as a whole or the individual Judges of the Court from a repetition of the attack, but with a view to protect the public, and specially those who, either voluntarily or by compulsion, are subject to the jurisdiction of the Court, from the mischief they will incur, if the authority of the tribunal be undermined or impaired.

A contempt of Court is committed by libellous attacks on a Judge for what he did judicially, if such attacks are likely, or tend in any way, to interfere with the due administration of justice.

It is immaterial whether the attack on the Judge is with reference to a cause about to be tried, or actually under trial, or recently adjudged ; in each instance, the tendency is to poison the fountain of justice, to create distrust, and to destroy the confidence of the people in the Courts, which are of prime importance to them in the protection of their rights and liberties.

The publisher of newspapers have the right, but no higher right than others, to bring to public notice the conduct of Courts, and, provided the publications are true and fair in spirit, there is no law to restrain the freest expression of the disapprobation that any person may entertain of what is done in or by the Courts. But liberty of the press is not to be confounded with license or abuse of that liberty.

*Per Woodroffe, J. (Chitty and Fletcher, JJ. concurring)* : All proceedings whether in respect of Civil or Criminal contempts are of a criminal nature when their object is to punish by fine or imprisonment. The procedure in such cases is not in all respects the same as an ordinary criminal case. Both the offence as also the jurisdiction and procedure under which it is tried are *sui generis*. As regards the question of proof, no case either Civil or Criminal should be tried and determined otherwise than according to the law governing it. There is but one rule of evidence which in India applies to both Civil and Criminal trials and that is contained in the definition of 'proved' and 'disproved' in section 3 of the Indian Evidence Act.

*Per Mookerjee, J.* : A Criminal contempt is conduct that is directed against the dignity and authority of the Court. A civil contempt, on the other hand, is failure to do something ordered to be done by a Court in a civil action for the benefit of the opposing party therein. Consequently, in the case of a criminal contempt the proceeding is for punishment of an act committed against the majesty of the Law, and, as the primary purpose of the punishment is the vindication of the public authority, the proceeding conforms as nearly as possible, to proceedings in criminal cases. In the case of a civil contempt on the other hand, the proceeding in its initial stages at least, when the purpose is merely to secure compliance with a judicial order made for the benefit of a litigant, may be deemed

**Contempt of Court—(Contd.).**

instituted at the instance of the party interested and thus to possess a civil character. But, here also, refusal to obey the order of the Court may render it necessary for the Court to adopt punitive measures against the person who has defied its authority ; at that stage, at least, the proceedings may assume a criminal character. In this manner, the dividing line between acts which constitute criminal and others which constitute civil contempts may become indistinct in those cases, where the two gradually merge into each other.

The power to punish for contempt is inherent in the very nature and purpose of Courts of Justice. It subserves at once a double purpose, namely, as an aid to protect the dignity and authority of the tribunal and also as an aid in the enforcement of civil remedies. The power may consequently be exercised in civil or criminal cases or independently of both, and either solely for the preservation of the authority of the Court or in aid of the rights of the litigant or for both these purposes combined.

A proceeding to punish for contempt has the essential qualities of a criminal proceeding, whether the proceeding is initiated primarily to vindicate the Court's authority or solely as a coercive and a remedial measure to enforce rights of the litigant or for both these purposes combined.

Where the sole purpose sought by initiating the proceeding is to secure the coercive and remedial action of the Court against a party, the Court may, nevertheless in its discretion, add a punishment by way of fine or imprisonment, for the failure of the person in contempt to obey its mandate. The proceeding must be regarded from its inception to the point of judgment as of a criminal nature, or, at least potentially so. It is the judgment which must eventually in any case determine the character of the proceeding.

Where the contempt consists in an attack upon the Court, the proceedings instituted to vindicate its dignity, are of a criminal nature, even though the attack has been made in connection with civil suits or appeals, either actually decided or pending or about to be taken up for disposal.

*Woodroffe, Chitty and Fletcher, JJ.* : One cannot escape either contempt or libel merely by alleging that there was a rumour.

Where the writer knew that proceedings were still pending, the fact that he did not desire or intend to prejudice the case, is immaterial (except as the extent of his punishment) if the Court be satisfied that such was the obvious and necessary result of his words.

Objections should even when legal, have some relation to reality.

*Woodroffe, Mookerjee, Chitty and Fletcher, JJ.* The word 'record' in section 74 (2) of the Indian Evidence Act means collection of documents.

Secondary evidence of the returns filed under section 32 of the Indian Companies Act and in the custody of the registrar of joint stock companies, is admissible.

Returns in the custody of the registrar of joint stock companies constitute public records of private documents within the meaning of section 74, sub-section 2 of the Indian Evidence Act.

**Contempt of Court—(Contd.).**

*Mookerjee, J.* : Although secondary evidence may be admissible, the party who produces the evidence is not relieved of his obligation to prove the execution of the document, just as if the original had been produced, unless the case is covered by section 90 of the Indian Evidence Act or the legislature has expressly provided that the document or endorsement thereon is receivable in evidence without proof of execution, as, for example, in section 60 of the Registration Act.

The procedure should be at least equally strict and adherence to the forms of the law at least equally scrupulous, when the Court finds itself in the position of prosecutor and Judge and an unexpected lacuna in the evidence transpires during the trial. The Court must act with great caution in strict conformity with the requirements of the law and avoid a perhaps not unnatural tendency to supplement the evidence.

*Woodroffe, Chitty and Fletcher, JJ.* : Whether directors of a company are responsible for contempt of Court, depends on the facts of each case.

*Mookerjee, J.* : It cannot be held as a matter of law, that the directors of a limited company which owns a newspaper, are liable to be committed for a contempt of Court on account of a libel published in the paper.

The weight of modern authority is that proceedings by way of contempt would lie against corporations as well as individuals : in the case of individuals, the process is by attachment of the persons followed by fine or imprisonment or both : in the case of corporations, the process is by fine followed by sequestrations or distraint.

*Per curiam* : Refusal by the printer to give up the name of the editor is a matter which will weigh with a Court in determining whether a penalty shall be awarded against the printer or not. In the matter of *Tarli Kand Blawss* ...

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The rights and liabilities of parties to a C. I. F. contract were formulated by Hamilton J. in *Biddell Bros. v. Clemens Horst Co.*

Where in a C. I. F. contract payment was to be made, not against the document, but forty-eight days after the goods had been landed, the

**Contract—(Contd.).**

• vendor was under no obligation to hand over the documents to the vendee immediately on receipt thereof; he could tender the documents on arrival of the goods, or might take delivery himself and make over the goods to the vendee.

An executory contract made with an alien enemy before war is avoided or dissolved by the outbreak of war, if it enures to the aid of the enemy, or, if it is in its nature incapable of suspension. A contract is deemed in its nature incapable of suspension if its proper performance necessitates intercourse with the enemy during the war, or where time is of the essence of the contract, or the parties cannot, on conclusion of peace, be made equal.

The Prize Court alone has jurisdiction to determine the question of freight and the conditions whereon the cargo should be released. The Prize Court deals with such claims in accordance with the Law of Nations and upon equitable principle freed from contracts, which almost always cease to have effect upon capture or seizure by reason of the non-appearance or non-completion of the contract of affreightment; it may, indeed, discard the contract rate altogether even as a basis for assessment or calculation.

Where a ship is condemned but the goods released, the Crown is entitled to impose the payment of freight as a condition of their release, and has a lien on them till it is paid. The original bills of lading would be of no avail whatever, unless the consignee complied with the conditions imposed by the Prize Court; they would be useful for identification of the assignee in whose favour the Prize Court had decided to release the goods, but they had ceased to be operative legal documents, and delivery on their basis could not be claimed as a matter of right. Hence the contract of affreightment and therewith the C. I. F. contract of sale in the present case, became void on the outbreak of war. Consequently the rights and liabilities of the parties thereafter must be determined with reference to the second paragraph of section 56 of the Indian Contract Act, and no question of damages for breach thereof arises.

*Madhoram Hurdeodas v. G. C. Sett* ... .. 62

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*Costs—Adjudication order, setting aside of—Benamidar's liability to pay costs—Abuse of process of Court—Application before different Bench—Party made liable, residing outside jurisdiction—Jurisdiction.*

A, B, C, D and E were members of a certain firm. On the application of F, wife of S—A, B, C and D were adjudicated insolvents. The order of adjudication was made on the basis that certain shares in the business had been assigned to H. S and E were joint in business. It was found that assignment to H was an assignment to him as a *benamidar* for E and S. It was also found that F was not a real creditor of the firm at all but that she was put forward merely as a blind for E and S.

An appeal was preferred by persons who were adjudicated insolvents at the instance of F. An application for the cancellation of the adjudication was made on the ground that there was no debt due to F and this application was dismissed by the Judge sitting on the original side. An appeal was preferred and was heard by a Bench consisting of three Judges. The appeal was allowed. Subsequently an application was made by the petitioner (the appellant in the appeal) before a Bench differently constituted, praying for an order that the real people behind F should be made to pay the costs of the proceeding connected with the claim of F as a creditor in the insolvency :

*Held*, that the Bench so constituted had jurisdiction to deal with the matter. That the Court had jurisdiction to make an order with regard to the costs of the insolvency proceedings, when it was satisfied upon the facts of the case that the proceedings were an abuse of the process of the Court.

That E and S should pay the costs of the insolvency proceeding, inasmuch as there were no means of getting them paid by F, she having no property.

That though E lived outside the jurisdiction of the original side of the High Court and did not carry on business within that jurisdiction, the Court had jurisdiction to make an order with regard to the costs of the insolvency proceedings, as it was found that he was in reality one of two persons who came to Court for the purpose of making use of the process of the Court. *Ketokey Charan Banerjee v. Srimati Kumari Debi*

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**Court's—(Contd.).**

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— **Fee—Suit for administration and account ; See Suit, valuation of** ... 265

**Court-Fees Act, Sec. 7 cl. (4) (f)—Suit for accounts—Suit for administration and accounts ; See Suit, valuation of** ... .. 265

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**Criminal appeals—Practice of the Judicial Committee.**

The Judicial Committee is in general not a Court of review in criminal cases, but while it does not interfere merely on the question whether the Court below has come to a proper conclusion as to guilt or innocence, it ought to interfere where there has been a disregard of the proper forms of legal process, grievous and not merely technical in character, or a violation of principle in such a fashion as amounts to a denial of justice. But in hearing criminal appeals the Judicial Committee would not act in the free fashion of a fully constituted Court of criminal appeal.

Where the error in procedure is of a grave character, as for example, when it deprives an accused of a constitutional or statutory right to be tried by a jury, or by some particular tribunal ; or where the error in procedure is carried to such an extent as to cause the outcome of the proceedings to be contrary to fundamental principles which justice requires to be observed, the Judicial Committee, even if they thought the accused guilty, would not hesitate to recommend the exercise of the prerogative of the Sovereign. But where the error in procedure consists only in the fact that evidence has been improperly admitted, which was not essential to a result which might have been come to wholly independently of it, the Judicial Committee would not advise the Sovereign to interfere.

**Dal Singh v. The King-Emperor** ... .. 13

**Criminal contempt, what is ; See Contempt of Court** ... .. 459

**Criminal Procedure Code (Act V of 1898), Secs. 145, 146—Jurisdiction—Rejection of evidence on erroneous grounds—Gross and material irregularity—Order, if liable to be set aside on that ground—Bengal Survey Act (V of 1875), Secs. 40, 41, decision under, effect of—Record-of-rights—Presumption as to possession.**

An order under section 146 of the Code of Criminal Procedure was set aside on the ground that although there was no lack of jurisdiction at the time of the initiation of the proceedings under section 145 of the Code, the Magistrate made his final order either without jurisdiction or after such gross and material irregularities as seriously to prejudice one of the parties, by discarding and rejecting on erroneous grounds practically every piece of evidence that might have led him to a correct conclusion as to possession,

Where a dispute between the parties had been terminated by an order under the provisions of sections 40 and 41 of the Bengal Survey Act, and there had also been an entry in the Record-of-rights in accordance with

**Criminal Procedure Code—(Contd.)**

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| that order, the Magistrate should in determining the question of possession between the parties in a subsequent proceeding under section 145 of the Code of Criminal Procedure, presume that the possession of the land was with the owner who had title as determined by the decision under the Survey Act, and which title was further to be presumed from the entry in the record-of-rights. <i>Prafulla Nath Tagore v. J. Holding</i> ...                                                                  | 39  |
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| _____, ( <i>Act V of 1898</i> ), Sec. 435—'Discharge'—Acquittal on a charge actually framed, if a discharge in respect of any other charge which might have been framed.                                                                                                                                                                                                                                                                                                                                       |     |
| A was tried by a Magistrate exercising first class powers, upon a charge of forgery framed under section 465 of the Indian Penal Code. The Magistrate found him not guilty and acquitted him under section 258 of the Code of Criminal Procedure. The complainant then moved the Sessions Judge. He held that the offence alleged, fell under section 467 of the Indian Penal Code and made an order directing that A be committed to the Court of Sessions for trial upon a charge framed under that section: |     |
| <i>Held, Per Tennon, J.</i> : The Magistrate's order acquitting A of an offence under section 465 of the Indian Penal Code, was an order discharging A of the graver offence in respect of the same document punishable under section 467.                                                                                                                                                                                                                                                                     |     |
| <i>Per Richardson, J.</i> : The Sessions Judge had no power to direct A's commitment to the Sessions Court for trial, as the Magistrate made no order which was either in terms or in substance an order of discharge. <i>Abdul Hakim Khan v. Buzruk Ali</i> ...                                                                                                                                                                                                                                               | 210 |
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*Decree, execution of—Civil Procedure Code (Act XIV of 1882), Sec. 248—  
Order for execution made without notice, if valid—Notice to representative of judgment-debtor, of application for transmission of decree.*

Notice under section 248 of the Code of Civil Procedure is requisite; but no such notice is essential, if the requisite notice was given upon a previous application for execution.

A notice given to the representative of the judgment-debtor, of the application for transmission of a decree, cannot be treated as notice given upon a previous application for execution within the meaning of section 248 of the Code of Civil Procedure.

If a notice under section 248 of the Code of Civil Procedure is requisite, an order for execution made without notice, is a nullity. *Maharaj Bahadur Sing v. Inder Chand Bothra* ... .. 130

—, *execution of—Order made in execution proceedings—Limitation—Entries in order-sheet—Burden of proof.*

An order made at one stage of execution proceedings cannot be questioned at a late stage, unless the parties sought to be bound by such order had no notice of the proceedings.

When an order for attachment was made after service of notice on the judgment-debtor under rule 22, Order 21 of the Code of Civil Procedure and was followed by service of the writ of attachment, to entitle the judgment-debtor to escape from the operation of the order, he must establish that the order was made without notice to him.

The party who contends that the entries in the order-sheet do not correctly state the events that have taken place, must start his case. The position is different where the entry affects a person who is not a party to the proceeding. *Bindu Bashini Dasya v. Keshab Lal Bose* ... .. 109

—, *invalid—Suit against minors—Minors unrepresented.*

When the proposed guardian does not enter appearance and accept the office, the duty of the Court is to appoint one of its officers to act as guardian ad-litem for the infants. Where the Court omitted to take this essential step, but proceeded to decide the suit on a date which had been fixed for the appointment of a guardian and not for the final disposal of the suit, the decree made in the suit against the minors, was inoperative in law, and the execution sale consequent thereupon, was a nullity. *Baneswar Pramanik v. Tarapada Bhattacharjee* ... .. 258

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| In suits for land an action cannot be maintained by a <i>benamidar</i> :                                                                                                                                                                                                           |       |
| A Court cannot be invited by a person, who has deliberately sought to<br>utilize the machinery of the Courts for the purpose of creation of fictitious<br>titles, to recognise and enforce such an unreal title. <i>Surendra Nath</i><br><i>Ghose v. Kallgopal Majumdar</i> ... .. | 333   |
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| The manufacture and sale of a preparation of <i>Mrita Sanjivani Sudha</i><br>otherwise than in conformity with the provisions of the Excise Act, is an<br>offence.                                                                                                                 |       |
| A preparation containing alcohol, though a medicinal preparation or may<br>be used for medicinal purpose, is within the provisions of the Bengal<br>Excise Act. <i>Ganesh Chandra Sikdar v. King Emperor</i> ... ..                                                                | 342   |
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Execution sale—(*Contd.*).

- A transferee of immovable property from the judgment-debtor after attachment of property in execution of a decree for money, is competent to make an application for cancellation of an execution sale under rule 89 of order 21 of the Code of Civil Procedure. *Gosto Behari Biswas v. Sankar Nath Mookerjee* ... 117
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- Ex parte decree, order setting aside, if valid—Security bond, accepted by Court, but not registered; *See Provincial Small Cause Courts Act* Sec. 17 ... 315
- Ex-proprietary right, agreement to surrender—Sale of mahal—North-Western Provinces Tenancy Act, Secs. 10, 20, 83; *See Agreement to surrender* ... 24
- Father, if and when can affect or dispose of joint family property—Mitakshara law; *See Alienation* ... 1
- Father's debt, obligation to pay, when attaches; *See Alienation* ... 1
- power of affecting or disposing of joint family property for necessary purposes—Mitakshara law; *See Alienation* ... 1
- Forfeiture—*Disclaimer of landlord's title—Permanent tenure.*
- A permanent tenure is liable to forfeiture on the ground of disclaimer of the landlord's title.
- To constitute a disclaimer, it must be the renunciation by a party of his character as tenant by setting up a title in a third person or by claiming title in himself. *Annada Charan Datta v. Mohim Chandra Guha* ... 261
- Funds, joint or separate—Account books, entries in; *See Hindu Law—Joint family* ... 267
- Fund Invested—*Land Acquisition Act (I of 1894), Sec. 32—Special Judge, if can deal with questions of application of money—Power to enquire—Hindu widow—Burden of proof—Alienation of fund invested—Application of portion of fund to discharge liability on other portion.*
- As the fund which is invested in Government securities under section 32 of the Land Acquisition Act, is in the custody of the Special Judge, he is competent to deal with the question of its application. He is competent to apply the fund in the purchase of other lands or in paying to a person who has become absolutely entitled thereto. Such authority, however, implies a power to make an enquiry.
- When the land is converted into money and is in the custody of a Special Judge, he is the proper officer to determine whether any portion of the fund should be made over to the widow and for this purpose to investigate whether contingencies have happened which entitle the widow to make an absolute alienation of the fund.
- It is incumbent upon a Hindu widow in the first instance to establish that events have happened which entitle her to spend either in whole or in part the fund, invested in Government securities under section 32 of

**Fund invested—(Contd.).**

the Land Acquisition Act, and in the custody of the Court. When she has satisfied the Court that such events have happened, the burden shifts upon the reversioners to meet her allegations.

Section 32 of the Land Acquisition Act contemplates the application of the compensation money in the purchase of other lands. These lands, when acquired, become additions to the estate of the full owner from whom the Hindu widow derives title. When a Hindu widow asks for an application of a portion of the fund to discharge a burden which has been imposed upon another portion of the estate of the husband of the lady, it is not "the investment of money in the purchase of other lands," but the satisfaction of a charge imposed upon another portion of the estate.

**Debedra Nath Dey v. Tulsimani Dasl** ... .. 123

**Gift—Hindu Law—Gift to an idol—Reservation in favour of settlor's family—Whether it invalidates the gift or reduces it to a charge.**

The mere fact that a Hindu settlor, in settling property upon an idol, directs that members of his family should be the managers of the temple, and reserves a portion of the income of the settled properties for their remuneration, does not at all events if the income so reserved is moderate, invalidate the endowment either as a whole or to the extent of the income so reserved.

*Semble*, that it might be otherwise if the income reserved were large.

**Jadu Nath Singh v. Thakur Sitā Raml** ... .. 309

— to idol—Reservation in favour of settlor's family—whether it invalidates the gift or reduces it to a charge; *See Gift* ... .. 309

**Hakikat Chowhuddibandl papers—Evidence, admissibility of; See Permanently settled estate** ... .. 590

'Heard and finally decided'—Proceeding in a former suit—Suit dismissed on merits—Suit, dismissal of, on the ground of it not being properly constituted, by the Appellate Court; *See Res judicata* ... .. 568

**High Court—Contempt not coming under the provisions of the Penal Code—Jurisdiction; See Contempt of Court** ... .. 401

—Contempt proceeding; *See Contempt of Court* ... .. 346

—Court of records; *See Contempt of Court* ... .. 459

—Jurisdiction; *See Contempt of Court* ... .. 401

—Power to punish summarily a contempt of Court committed by the publication of a libel on the Court or on the Judges, when the Court is not sitting; *See Contempt of Court* ... .. 459

**Hindu Law—Joint family—Mitakshara—Blending of self-acquired property with ancestral property—Effect of entries in account books as showing whether funds are joint or separate.**

A, a member of a Hindu joint family whose home was at Lucknow, practised as a pleader at Hardoi, and made considerable savings from his professional earnings. He eventually became managing member, but was all along entrusted with the management of the joint family property in Hardoi. Throughout he kept the accounts of joint property and of his own earnings in one account book. He purchased sundry

## Hindu Law—(Contd.).

properties out of the funds so entered in the name of his son-in-law B, and stated that he made such purchases to provide for B :

*Held*, that by blending his private earnings with the receipts and payments on joint account he showed an intention to make them joint property : but that this was not conclusive that all purchases entered in the book were made for the joint family : and that as regards the purchases in the name of B, A's statement that they were made to provide for B was a statement against his own interest and as such admissible in evidence, and that coupled with the other evidence in the case it established B's title to such properties as against the joint family.

In the Hindu joint family the law is that, while it is possible that a member of the joint family should make separate acquisition, and keep monies and property so acquired as his separate property, yet the question whether he has done so is to be judged from all the circumstances of the case. *Pandit Suraj Narain v. Pandit Ratan Lal* ... ..

267

— *Joint family—Mitakshara—Partition—Suit for partition dismissed though right to partition admitted—Whether status remains joint or several.*

The institution of a suit for partition by a member of a Hindu joint family subject to the Mitakshara law claiming his share of the family property, amounts to an intimation to his co-sharers, the defendants, of an unequivocal desire on the part of the plaintiff for separation from the joint family ; and the commencement of such a suit effects the plaintiff's separation from the joint family.

A member of a Hindu joint family instituted a suit for partition. The suit was dismissed on the ground that though he had a legal right to partition, he had in the Judge's opinion no proper motive for exercising that right. Thereafter he mortgaged his share, and on the mortgagee suing claimed to be still joint :

*Held*, that notwithstanding the judgment the mortgagor had become separate from the date of his suit and that the mortgage of his share was valid. *Kawal Nain v. Budh Singh* ... ..

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— *Joint family property—Mitakshara—Mortgage by head of joint family—Whether property can be made available to the extent of mortgagor's interest—Equity arising out of representation of authority.*

Where the property of a Hindu joint family is mortgaged by one of the members (save and except by the head of the family for antecedent debt or proven necessity of the joint family) the general law is that the mortgage is void and is not valid even to the extent of the mortgagor's interest.

It is possible that exceptions to this general rule may arise from special circumstances, e.g., from a representation or undertaking by the mortgagor that he had power to mortgage the joint property : but no special circumstances were held to exist in the present case. *Lachhman Prasad v. Saranam Singh* ... ..

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**Hindu Law—Mitakshara—Permanent blindness after birth—Exclusion from a share of the family property.**

Under the Mitakshara a member of the joint Hindu family, who becomes permanently blind after he is born, is not excluded from sharing in the family property by reason of a permanent and incurable blindness which was not congenital. *Mussummat Gunjeshwar Kunwar v. Durga Prashad Singh* ... ..

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**Homestead land—Raiyat holding homestead as his own dwelling, effect of—Bengal Tenancy Act, Sec. 182.**

A raiyat was in possession of an agricultural jote and paid rents for two years. Then she built herself a homestead and used it as her own dwelling and lived there :

*Held* that in the absence of any special custom or usage, section 182 of the Bengal Tenancy Act applies and she must be taken to be a raiyat as regards the homestead. *Iswar Chandra Dey v. Murari Lal Dutt* ...

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**Idol, gift to—Reservation in favour of settlor's family—Whether it invalidates the gift or reduces it to a charge; See Gift** ... ..

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**Ignorance of contents—Printer printing libellous thing; See Contempt of Court** ... ..

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**Inams; See Water cess** ... ..

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**Indian Motor Vehicles Act, section II, Rules under—Part II, Rules 1, 19,**

contravention of by owner's licensee or servant during the period of user—Owner's liability; See Master and servant ... ..

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**Inherent power—Appellate Court, if can order a remand and a retrial, in cases not coming under Order 41, Rule 23 of the Code of Civil Procedure;**

*See Remand* ... ..

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**Insult offered to a Judge in the exercise of the duties of his office; See Contempt of Court** ... ..

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**Irrigation—Permanent settlement—Extent of zemindar's or inamdar's right of user under engagements with Government—River or stream belonging to Government; See Water cess** ... ..

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**Joint family—Mitakshara—Blending of self-acquired property with ancestral property; See Hindu Law—Joint family** ... ..

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**—family, head of, mortgage by—Property, if available to the extent of mortgagor's interest—Representation of authority; See Hindu Law—Joint family property** ... ..

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**—family property—Mitakshara law—Alienation by co-parcener, effect of; See Alienation** ... ..

1

**—family property, mortgage of, by father for antecedent debt, when valid; See Alienation** ... ..

1

**Joint Offence—Punishment, joint or several—Calcutta Municipal Act, Secs. 559—Bye-laws 83, 85.**

A, B and C were joint proprietors of a theatre. The theatre was kept open beyond the prescribed hour in contravention of bye-law 83 made under section 559 :

*Held*, (*Chitty and Chaudhuri, JJ.*) that the maximum fine of Rs. 20 prescribed by Bye-law 85 made under section 561 must be jointly imposed upon all the proprietors and equally apportioned amongst them.

## Joint Offence—(Contd.).

|                                                                                                                                                                                                                                         |     |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| — <i>Teunon J. contra</i> , that the Court was competent to impose a fine of the maximum amount upon each of the proprietors. <i>Amrita Lall Bose v. Corporation of Calcutta</i> ... ..                                                 | 29  |
| Judge, charging with presumptuous tyranny for the mode in which he is proceeding in a matter pending before him; <i>See</i> Contempt of Court ...                                                                                       | 346 |
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| — — High Court—Contempt not coming under the provisions of Penal Code; <i>See</i> Contempt of Court ... ..                                                                                                                              | 401 |
| — — High Court—Contempt punishable under Penal Code—Punishment; <i>See</i> Contempt of Court ... ..                                                                                                                                     | 401 |
| — — Order under section 146 of the Code of Criminal Procedure—Rejection of evidence on erroneous grounds—Gross and material irregularity—Order, if liable to be set aside; <i>See</i> Criminal Procedure Code, sections 145, 146 ... .. | 39  |
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| Land Acquisition Act, section 32—Fund invested in Government securities—Hindu widow's power to spend—Burden of proof; <i>See</i> Fund invested ...                                                                                      | 123 |
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| Law, construction of—Language used, interpretation of ; <i>See</i> Contempt of Court ...                                                                                                                                                                                                                                                                                                                                                                                                                                                       | 459   |
| Lease, permanent, of a building site belonging to a temple by its shebait, if valid ; <i>See</i> Mutt ...                                                                                                                                                                                                                                                                                                                                                                                                                                      | 153   |
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| Legal necessity—Burden of proof ; <i>See</i> Alienation ...                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    | 1     |
| Libel— <i>Caste dispute—Publication of resolution of caste Panchayat—Privilege—Whether destroyed by irregularity in passing resolution.</i>                                                                                                                                                                                                                                                                                                                                                                                                    |       |
| B, the chowdhri or chairman of one of a caste panchayat, in his capacity as chowdhri communicated to another section of the caste and also circulated to other members of his section a resolution of the panchayat of his section suspending social relations with G's family. In an action for libel brought by G against B, it was contended that G had no proper notice of the meeting of the panchayat, and that in consequence the passing of the resolution was contrary to natural justice, and B was not privileged in publishing it. |       |
| <i>Held</i> , that it was the duty of B to give effect to the decisions of the panchayat and to communicate the result of its proceedings to parties interested ; that the other section of the caste and other members of B's own section were interested in the decision communicated to them ; that in making the communication B, acted in the discharge of the duty imposed on him ; and that the occasion was privileged.                                                                                                                |       |
| <i>Held, also</i> , that unless it could be shown that B was bound to examine into the regularity and correctness of the panchayat's decisions before communicating it to parties interested in the question under decision, the privilege was not affected or rebutted by want of or irregularity in notice.                                                                                                                                                                                                                                  |       |
| To defeat or rebut privilege, the law does not recognise anything short of actual or express malice in the publication of the matter which is charged to be libellous : <i>Gobind Das v. Bishambhar</i> ...                                                                                                                                                                                                                                                                                                                                    | 282   |
| ———Feigned name ; <i>See</i> Contempt of Court ...                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             | 345   |
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| Limitation— <i>Executions, application for—One decree passed in a suit for rent for three tenancies—Liability separate—Judgment-debtor same—Limitation Act (IX of 1908) Sch. I. Art. 18a.</i>                                                                                                                                                                                                                                                                                                                                                  |       |

The plaintiffs instituted a suit for rent against the defendants, who held under them three distinct tenancies under three separate contracts.

## Limitation—(Contd.).

On the 5th June, 1911, a decree was drawn up, which specified that a certain sum A was to be realised by sale of tenure X, that a similar sum B was to be realised by sale of tenure Y, and that a third sum C was to be payable by the judgment-debtors. There was also a direction in the decree that in the event of non-satisfaction of the sums due in respect of X and Y, the balance might be recovered from the person and property of the judgment-debtors. On the 27th August, 1913, the decree-holders applied for execution of the decree. They stated that in respect of the third tenancy a separate decree had been passed and prayed, *first*, that the sum due therefrom might be realised by attachment and sale of the movable properties of the judgment-debtors, and, *secondly*, that if the whole amount due was not realised, the balance might be recovered by attachment of their persons. Subsequently, on the 16th September, 1914, an application was made for execution, wherein the decree-holders stated that "a decree had been passed in respect of the first tenure for a certain sum, that a decree had been passed in respect of the second tenure for another sum and that a decree had been passed in respect of a third tenure for a different sum" They prayed that the first two sums due might be realised by sale of the first two tenancies respectively, and that, if the whole amount was not thereby obtained, process might issue against the persons and other properties of the judgment-debtors :

*Held*, that the application for execution dated the 16th September, 1914, with regard to the sums claimed from the first two tenancies, was barred, but that in respect of the sum due from the third tenancy, was in time. *Dhirendra Nath Sarkar v. Nischintapore Company* ...

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—*Sufficient Cause for not presenting an appeal within the prescribed period—Whether time spent in applying for review may be excluded in computing the period—Whether mistake of law may amount to sufficient cause—Indian Limitation Act (Act IX of 1908) Secs. 5, 14—Judicial discretion—Duty of superior Court when it is questioned—Abatement of suits should not be pronounced exparte—Procedure in questioning abatement—Whether review or appeal is the proper remedy—Code of Civil Procedure (Act XIV of 1882) Secs 365, 366, 368, 371 and 588—Substitution of parties in miscellaneous appeal—Sufficient for all stages of a suit.*

All that section 5 of the Limitation Act (IX of 1908) requires in express terms as a condition for the exercise of the discretionary power of admitting an appeal presented after time is 'sufficient cause for not presenting' it within time. The true guide for a Court is whether the appellant has acted with reasonable diligence in prosecuting his appeal and if he has been delayed by prosecuting other civil proceedings, e. g., a review, whether such proceedings were reasonably prosecuted and in good faith. A mere mistake in law is not *per se* sufficient cause for asking the Court to exercise its discretion under section 5, but when it has in fact occa-



## Limitation—(Contd.).

sioned erroneous proceedings it may be the foundation for an application for the indulgence which may be granted under section 5.

These rules having been laid down by Full Benches in all the Courts of India and acted on for years the Privy Council will not interfere with them, whatever the law in England and whatever they might have been disposed to do if the matter were open.

If a Judge purporting to exercise discretion does so under the view that there is no general rule, when in fact there is one, he misdirects himself as to the law to be applied to the case, and the superior Court must either remit the case or exercise the discretion themselves.

An order abating a suit is tantamount to a judgment in favour of defendant and should not be pronounced *ex parte* without notice to the opposite side.

Section 371 of the Code of Civil procedure, 1882, which gives a remedy by review against an abatement order, is available to a plaintiff whether such order is passed under section 366 or section 363. The appeal allowed by section 588 is intended for matters other than abatement.

Where a suit in a District Court was delayed pending disposal by the Chief Court of an appeal against an interlocutory order passed in such suit, and substitution of parties was effected only in the Chief Court in such appeal and not in the District Court :

*Held*, that the introduction of a plaintiff or defendant for one stage of a suit is an introduction for all stages, and that it was unnecessary to again apply to substitute parties in the District Court. *H. H. Brij Indar Singh v. Lala Kanshi Ram* ... ..

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— *Suit for recovery of possession—Auction-purchaser—Limitation Act (IX of 1908), Sch. I. Arts. 137, 138, 142—Burden of proof.*

Article 137, Sch. I of the Limitation Act applies to an auction-purchaser of the rights of a judgment-debtor not in possession at the date of the sale, while article 138 applies to an auction-purchaser of the rights of a judgment-debtor in possession at the date of the sale. In the former case the suit must be brought within 12 years from the date when the judgment-debtor is first entitled to possession ; in the latter case the suit is in time if brought within 12 years from the date when the sale becomes absolute.

The burden lies entirely upon the plaintiff to prove not only that he has a title but a subsisting title which he has not lost by the prescriptive sections of the Limitation Act ; in other words, he must show which article of the Limitation Act saves his suit from the bar of limitation. *Dokari Joddar v. Nilmani Kundu* ... ..

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Limitation Act, section 5—Discretion—Condition for exercise of power—

Appeal presented after time ; *See* Limitation ... ..

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—, section 5—'Sufficient cause'—Mistake in law ; *See* Limitation ... ..

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| —————( <i>IX of 1908</i> ), Sch. I, Art. 182, cl. (5)—“ <i>Step in aid of execution</i> ”—Application for summoning witnesses, if saves limitation—Application in opposition to judgment-debtor's objection.                                                                                                                                                                                                                                      |     |
| An application for execution of a decree for possession of certain property having been made, and upon an objection having been filed by the judgment-debtor, the Court found it necessary to ascertain the standard of measurement, and for that purpose the decree-holder applied for summons upon his witnesses. The execution case was subsequently dismissed for default. A fresh application for execution of the decree having been made : |     |
| <i>Held</i> , the application made by the decree-holder for summoning witnesses was an act in furtherance of his application for execution, and was therefore a ‘step in aid of execution’ within the meaning of article 182, cl. (5) of Schedule I, of the Indian Limitation Act.                                                                                                                                                                |     |
| A ‘step in aid of execution’ must be a positive step taken by the decree-holder on his own account in furtherance of his own application, and not merely in opposition to any objection taken by the judgment-debtor.                                                                                                                                                                                                                             |     |
| Kedar Nath Dey Roy v. Lakhl Kanta Dey                                                                                                                                                                                                                                                                                                                                                                                                             | 115 |
| —————, Sch. I. Art. 182, cls. (1), (5), (6).—One decree passed in a suit for rent for three tenancies—Judgment-debtor same—Liability separate—Execution, application for, as regards one tenancy ; <i>See</i> Limitation                                                                                                                                                                                                                          | 118 |
| Madras Act VII of 1865, Ss. 1, 2—‘Free of separate charge’—‘Standing and flowing water’ ; <i>See</i> Water cess                                                                                                                                                                                                                                                                                                                                   | 290 |
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| Master and Servant—Master's liability for the acts and conduct of his servant— <i>Indian Motor Vehicles Act, Sec. 11, Rules under—Part II, Rules 3, 19, contravention of.</i>                                                                                                                                                                                                                                                                     |     |
| Where an owner has permitted or authorised the use of his motor vehicle, he is under Part II, rules 3 and 19 of the rules framed by the Governor-in-Council under section 11 of the Indian Motor Vehicles Act, liable for any contravention of the Rules committed by his licensee or servant during the period of such user. <i>Baldya Nath Bose v. King-Emperor</i>                                                                             | 37  |
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*Minerals, right to—Permanent tenure—Mokurridar—Mokurari pottah—Effect of pottah with all rights (mai huk hakuk) and power to cut and sell trees.*

Where the proprietor of a zamindari executed a permanent heritable and transferable mokurari pottah at a fixed rent of a small portion of a village within its ambit "with all rights (*mai huk hakuk*),—appertaining to my zamindari," and giving the mokuridar power to cut and sell the trees, *held* that the mineral rights were ~~not~~ included in the pottah, which gave the mokuridar only surface rights; and that in the absence of an express grant the mineral rights remained in the zamindar.

*Rajkumar Thakur Gridhari Singh v. Megh Lal Pandey* ... 584

*Minors, suit against—Minors unrepresented—Decision of suit on a date fixed for appointment of guardian-ad-litem—Sale in execution, if valid; See Decree, invalid* ... 258

*Mortgage by head of joint family—Property, if available to the extent of mortgagor's interest—Representation of authority; See Hindu Law—Joint family property* ... 97

— of joint family property by father—Mitakshara law—Liability of sons in suit to enforce such a mortgage—Pious obligation of sons to discharge their father's debt, when arises; *See Alienation* ... 1

— of joint family property by father for antecedent debt, when valid; *See Alienation* ... 1

*Mrita Sanjivani Sadha, manufacture and sale of, if an offence; See Excise* ... 342

*Mutt—Hindu Law—Temple—Endowed property—Powers of alienation by a mahant or shebait—Necessity—Benefit to estate—Permanent lease of debottar lands—Permanent lease of a building site—Usage repugnant to the purpose of the endowment cannot be upheld—Existence of an ancient custom—A question of mixed law and fact.*

It is a breach of duty on the part of a shebait, unless constrained thereto by unavoidable necessity, to grant a lease in perpetuity of debottar lands at a fixed rent, however adequate that rent may be at the time, as the debottar estate is thereby deprived of the chance it would otherwise have of deriving benefit from the increment in value of the land. As to 'necessity' or 'benefit' to the estate: *Hunooman Persaud Panday v. Munraj Koonweree*; *Prosunno Kumari Debya v. Golab Chand Baboo* and *Konwur Doorgunath Roy v. Ram Chunder Sen* discussed and explained: that it was impossible to define the term, but preservation of the estate from extinction, the defence against hostile litigation affecting it, the protection of it or portions from injury or deterioration by inundation, and such like things would be benefits.

*Held, accordingly*, that in consideration of a premium a permanent lease of a building site belonging to a temple by its shebait was invalid as against the grantor's successor.

Property with which a temple is endowed should be used and its income applied for the particular religious or charitable purposes mentioned in the deed of endowment, if any, and in the absence of such a deed, the rules according to which such property and its income are to be dealt with in order to carry out the intention of the original endower can only

## Mutt—(Contd.).

be ascertained by inference from the practice proved by evidence to have been followed in the particular case. But these rules, so to be inferred, must not be inconsistent with or repugnant to the very nature and purpose of the endowment. If, for instance, the worship of the idol in the temple is intended to be perpetual, the preservation and use of the dedicated property to support and maintain that worship must be assumed to have been similarly intended to be perpetual; and consequently a rule which would authorise and empower a shebait of such a temple arbitrarily, at his own mere will and pleasure to alienate the dedicated property, either bit by bit or *en bloc* could not be upheld.

The existence of an ancient custom is a question of mixed law and fact.

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In Oudh, in cases to which the Oudh Rent Act (Amendment Act) applies, the Court of revenue has the exclusive jurisdiction to determine what is the status of a tenant of lands, and what are the special or other terms on which such tenant holds, and the civil Court has the exclusive juris-

## Oudh Rent Act—(Contd.).

diction to decide whether or not a person in possession of lands holds a proprietary or an under-proprietary right in the lands.

In a suit by the plaintiff, whose title as proprietor of a village within the meaning of that term in the Oudh Rent Act, and the Oudh Rent Act Amendment Act was not distinguished, against the holder of the village for a decree for the proprietary possession thereof and for a declaration that the defendant had neither proprietary nor under-proprietary right therein, on proof that the defendant is merely a tenant the claim for decree for possession must be dismissed for want of jurisdiction, but the plaintiff is entitled to the declaration prayed for.

Where the revenue Court had decided that the holders of a village were in 1852 owners of zamindari rights in the village, that they had not lost those rights, that it must be presumed that they were not ordinary tenants, and that the proprietor of the village should prove in the civil Court that they were ordinary lessees, and the proprietor then brought a suit in the civil Court for a declaration that they had no proprietary right of the nature of a zamindari, superior or inferior, in the village, and also for a declaration that the decision of the revenue Court did not affect his rights :

*Held*, that the decision of the revenue Court, which was subsequently acted upon in the preparation of the Khewat of the village, made it necessary for the proprietor to bring the suit, and that the fact that the holders of the village did not in their written statement in the suit set up that they had any proprietary or under-proprietary right, did not disentitle the proprietor to the declarations which he claimed. *Raja Mohammad Abul Husan Khan v. Prag* ... .. 165

Owner's liability for any contravention of the Rules framed under section 11 of the Indian Motor Vehicles Act, committed by his licensee or servant during the period of user ; *See* Master and servant ... .. 37

Ownership—Bed of a public navigable river ; *See* Permanently settled estate 590

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Penal Code (*Act XLV of 1860*), Sec. 216 B—"Assisting a person in any way," meaning of.

The expression "assisting a person in any way" in section 216 B of the Indian Penal Code is not restricted to methods which may properly be regarded as *ejusdem generis* or of a like nature with supplies of food or of other necessary articles. *Muchi Mian v. King-Emperor* ... .. 141

——, section 216 B—"Assisting a person in any way"—Methods *ejusdem generis* with supplies of food ; *See* Penal Code, section 216 B ... 141

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Permanently settled estate—*Ownership of the bed of a public navigable river—Ownership of its banks—Bengal Regulation XI of 1825—Slow accretion—Title to submerged land again left bare—Evidence—Admissibility—Survey maps made before and after 1793—Hakikat chowduddibandi (boundary) papers—Burden of showing exact course of the river in 1793—Permanent settlement and assumptions.*

The bed of a public navigable river is the property of the Government, though the banks may be the subject of private ownership. If there be slow accretion to the land on either side, due, for instance, to the gradual accumulation of silt, this forms part of the estate of the riparian owner to whose bank the accretion has been made.

If private property be submerged and subsequently again left bare by the water it belongs to the original owner:

Where the plaintiffs claimed that a large tract of land formerly under the river Ganges formed part of the permanently settled zemindari, three sets of documents were relied on, viz., *firstly*, a plan of a survey conducted by Major Rennel between the years 1764 and 1773: *secondly*, the *Hakikat chowduddibandi* (Boundary) papers, which were returns required for 1799 and made by the owners of the zamindari and sent in to the Government; *thirdly*, the Government survey map made in 1859, *held*, that they were all admissible in evidence, and that the evidence established the plaintiffs' claim except that the bed of the river was the property of the Government.

The *Hakikat chowduddibandi* papers were made on a Government form in pursuance of a Government request and to afford the Government for their purpose (which was not clear) satisfactory information upon various questions to which they furnished answers; the first of those questions, after a statement of the number of *mouzas*, being as to their boundaries. Those papers gave descriptions of the different *mouzas* with their different boundaries, and in the absence of any corrections whatever made in the statements and of any documents forthcoming from the Government showing that the returns were questioned, they must as between the Government and the zamindars (the plaintiffs) be accepted as *prima facie* accurate, and the boundaries so given unless shown to be erroneous, ought to be regarded as the boundaries of the *mouzas* forming part of the estates.

Their Lordships wholly rejected the contention that where there was a dispute as to the external boundaries of a permanently settled zemindari which happened to be traversed by a navigable river of variable course, the burden of showing the exact boundaries of that course in 1793 was on the zamindar. The object of the permanent settlement was to confirm the zamindars in their holdings at a fixed and immovable rent, and, if assumptions were made, one way or the other, they ought to proceed upon an attempt to justify the title rather than to render it insecure.

**Permanently settled estate—(Contd.)**

If in fact the boundaries are proved to include an area far greater than that referred to in the *Akikat chowhuddibandi* papers, such miscalculation or misrepresentation cannot defeat the title to the estate. *Haradas Acharjya Chowdhuri v. The Secretary of State for India* ... ..

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**Police diary—Evidence—Statements made to the police officer—Criminal Procedure Code, Sec. 172.**

A diary made by the investigating police officer under section 172 of the Code of Criminal Procedure, may be used under that section to assist the Court which tries the case by suggesting means of further elucidating points, which need clearing up, and which are material for the purpose of doing justice between the Crown and the accused, but not as containing entries which can by themselves be taken to be evidence of any date, fact, or statement contained in the diary. - The police officer who made the diary may be confronted with it, but not any other witnesses.

*Held*, accordingly, that in deciding an appeal against a death sentence and in confirming the sentence the High Court went wrong in testing the credibility of the witnesses called at the trial by reading the statements made by such witnesses to the police and entered in the police diary, and in treating what was thus entered as evidence for that purpose. *Dal Singh The King-Emperor* ... ..

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| There is no rule of law to prevent a litigant from instructing counsel direct-<br>ly, or to prevent counsel so instructed from appearing on behalf of a<br>litigant ; but a judicial opinion has been expressed that it is expedient in<br>the interest of suitors and for the satisfactory administration of justice to<br>adhere to the usage which requires that counsel should not accept a brief<br>in a civil suit from any one but a solicitor. The exact scope of the usage is<br>not very clearly defined, but it extends to all civil contentions business<br>and to all criminal business except what is known as a 'dock defence.'<br>It does not extend to the preparation of a will, to work before Parlia-<br>mentary Committees or to inquiries under the Local Government Act,<br>the Public Health Acts, or the Light Railways Act. A barrister may<br>advise in non-contentious business without the intervention of a solicitor,<br>though the practice has been stated to be undesirable. |       |
| A counsel engaged in a case should not select another counsel to be briefed<br>with him. <i>In re an Advocate</i> ... ..                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | 605   |
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When a Court acting under section 494 of the Code of Criminal Procedure, gives its consent to a withdrawal from a prosecution, it should record its reasons in order that High Court may be in a position to say whether



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the discretion vested in the Court has been properly exercised. *Umesh Chandra Roy v. Satis Chandra Roy* ... .. 208

**Provincial Small Cause Courts Act (IX of 1887), Section 17—Security bond, accepted by Court, but not registered—Order setting aside an ex parte decree, validity of.**

The requirements of section 17 of the Provincial Small Cause Courts Act are mandatory.

Where a security bond was given and accepted by the Court but not registered, it was held that an *ex parte* decree cannot be set aside under section 17 as the essential pre-requisites have not been complied with.

*Tarapada Ghose v. Jagat Mohini Dasl* ... .. 315

\_\_\_\_\_, Sec. 17, if mandatory; *See* Provincial Small Cause Courts Act, Sec. 17 ... .. 315

**Public man, criticising the acts of; *See* Contempt of Court** ... .. 346

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**Punjab Customary Law—Succession—Mahomedan Jats belonging to the sub-community of Dabs—Daughter married to a collateral and residing with her husband in her father's house—Khana-damad—Agnates—Riwaj-i-am, evidentiary value of.**

Among the Mahomedan Jats belonging to the sub-community of Dabs settled in the Jhang district in the Southern Punjab, a daughter married to a collateral who takes up his abode in the father-in-law's house and is known as the *Khana-damad*, or resident son-in-law, succeeds, in default of male issue, to her father's inheritance to the exclusion of the agnates.

Entries in the Riwaj-i-am (or official records of custom), even though not supported by instances, form a strong piece of evidence in support of an alleged custom, and unless such evidence is rebutted the custom must be held to have been established. *Beg v. Allah Ditta* ... .. 175

Purdanashin lady—*Examination on commission—Previous appearance in criminal case—Civil Procedure Code (Act V of 1908), Sec. 132.*

A *purdanashin* lady may completely alter her mode of life and cease to be included in the statutory description of "women, who according to the customs and manners of the country ought not to be compelled to appear in public." When this transformation has taken place, she can no longer claim, as of right, the statutory exemption formulated in section 132 of the Code of Civil Procedure. But, if she is, in fact, a *purdanashin* lady, she is not deprived of the statutory protection, merely because she may have previously appeared in public. As regards criminal cases, there has, perhaps, been a slight divergence of judicial opinion on the question of the examination of *purdanashin* ladies on commission. *Balakeshwari Dabee v. Jnanananda Banerjee* ... ..

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Raiyat building on the agricultural land and dwelling there—Bengal Tenancy Act, Sec. 182; *See* Homestead law ... ..

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Refund of money—Charge—Succeeding mutwali's liability—Execution of *maurasi maharrari* lease; *See* Waqf property ... ..

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Regulation IX of 1896, Sec. 10 ... ..

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Religious Endowments Act (XX of 1863), Sec. 10—*Temple Committee—Vacancy—Powers of the civil Court—Court—Judge—Persona designata—Order passed under that section—Code of Civil Procedure (Act V of 1908), Section 115—'Case', meaning of.*

Section 10 of the Religious Endowments Act, does not empower the civil Court to make an order directing the committee appointed under the Act, when they have failed to hold an election to fill up a vacancy, to fill it up by means of an election or to validate the filling up of it by these means in obedience to such an order. The Court can direct the remaining members of the Committee to fill up the vacancy, but the filling up of it must be their act.

The jurisdiction given to the civil Court under that section is given to the civil Court and not to an individual Judge who may preside in or constitute the civil Court.

The making of an order, which purports to have been made in exercise of the powers conferred upon a civil Court by the said section, is a judicial and not merely an administrative or ministerial act. In such matters the civil Court exercises its powers as a Court of law, not merely as a *persona designata* whose determinations are not to be treated as judgments of a legal tribunal.

Section 115 of the Code of Civil Procedure 1908, enables the High Court, in a case in which no appeal lies, to call for the record of any case and to pass such an order therein as the Court may think fit. The section applies to jurisdiction alone, the irregular exercise, or non-exercise of it, or the illegal assumption of it; the section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved.

The word "case" in that section is defined in the Code. It cannot be confined to a litigation in which there is a plaintiff who seeks to obtain a particular relief against a defendant before the Court, but includes an *ex*

**Religious Endowments Act—(Contd.).**

*parte* application praying that persons in the position of trustees or officials should perform their trust or discharge their judicial duties. It includes therefore an order of the civil Court purporting to have been made in exercise of the powers conferred thereon by section 10 of the Religious Endowments Act. *T. A. Balakrishna Udayar v. Vasudeva Aiyar* ... ..

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Religious Endowments Act, Sec. 10, jurisdiction given to civil Court under, nature of; *See Religious Endowment Act, Sec. 10* ... ..

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—, Sec. 10, order, nature of; *See Religious Endowment Act, Sec. 10* ... ..

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**Remand—Appellate Court—Civil Procedure Code, O. 41, R. 23—Inherent power.**

A Court of appeal has inherent power to order a remand and a retrial, if justice so requires it, in cases other than those mentioned in Order 41, rule 23 of the Code of Civil Procedure. *Abdul Karim Abu Ahmed Khan Ghaznavi v. The Allahabad Bank* ... ..

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**Rent—Payable partly in money and partly in kind—Contract—Market rate.**

A contract gave a right to a tenant to pay to his landlord rent partly in money and partly in paddy if he liked; on the other hand, if he did not like to deliver paddy, he could pay the rent altogether in money, and the contract provided the rate in that case:

*Held*, that the rent was payable at the price mentioned in the contract and not at the market rate of paddy at the time the suit was instituted. *Nilmadhab Mahapatra v. Sitansath Mahapatra* ... ..

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— payable partly in money and partly in kind—In case of non-delivery of paddy, rent to be paid wholly in money, the contract providing the rate—Market rate; *See Rent* ... ..

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**Repugnancy—Devise of whole estate to one person coupled with devise of a particular village to another—Express conferment of powers of alienation upon general devise and omission of such power in case of particular devise—Whether such difference of language limits the interest of the particular devise; *See Will*** ... ..

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**Res judicata—British Beluchistan Regulation (IX of 1896), Sec. 10—"Heard and finally decided"—Proceedings in a former suit—Practice.**

To support a plea of *res judicata* it is not enough that the parties are the same and that the same matter is in issue. The matter must have been heard and finally decided:

Where in a suit on a bond the defendant denied liability on the ground that it had been obtained from him by the fraud of the plaintiff, and it appeared that in a former suit by the defendant for a cancellation of the bond on the same ground the Court of first instance held that the defendant had failed to establish his allegation of fraud and dismissed the suit; this judgment was affirmed by the first appellate Court, but in the

• *Res judicata*—(Contd.)

second appeal the final appellate Court concurred in dismissing that suit as not properly constituted, without entering into the merits of the case :

*Held*, that the issue as to fraud had not been "heard and finally decided" in the former suit within the meaning of section 10 of the British Belu-chistan Regulation IX of 1896 ; and was not *res judicata*, as the second appeal in that suit had put an end to the finality of the decision of the lower Courts whose judgments were superseded by the judgment of the final Court of appeal. *Abdullah Ashgar Ali Khan v. Ganesh Dass* ... 568

Reversionary interest, if included within the expression right, title and interest of judgment-debtor—Execution sale ; *See Will*, construction of ... 250

Review, granting of ; *See Appeal* ... 187

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Right of vindicating one's character by reflecting on the character of another—False statement and wilful suppression of truth ; *See Contempt of Court* 345

Ritwaj-i-am, entries in, evidentiary value of ; *See Punjab Customary Law* ... 175

Sale proceeds, disposal of—Decree for rent, sale in execution of—Bengal Tenancy Act, Sec. 169 (1) cl. (c)—Arrears of rent, since the institution of the suit—Interest on such arrears, if can be paid out of the surplus sale proceeds.

Where a sale has been held in execution of a decree for arrears of rent, the landlord is, under section 169 (1) cl. (c) of the Bengal Tenancy Act, entitled out of the surplus sale-proceeds not only to the arrears of rent which accrued due since the institution of the suit but also to the interest due upon such arrears. *Prafulla Nath Tagore v. Matabaddin Mandal* ... 322

Sale in Execution, if valid—Suit against minors—Non-appointment of guardian-ad-litem—Suit, prosecution of, on the date fixed for the appointment of guardian-ad-litem ; *See Decree*, invalid ... 258

Sanction to prosecute—Criminal Procedure Code (Act V of 1898) Sec. 195, Clause (6), Cl. (7) Sub-clause (c)—Sanction, revocation of—Provincial Small Cause Court, if subordinate to Court of the District Judge.

A Provincial Small Cause Court is under sub-clause (c) of clause 7 of section 195 of the Criminal Procedure Code to be deemed to be subordinate for the purposes of that section to the Court of the District Judge.

*Nibaran Chandra Chuckerbutty v. Akshoy Kumar Banerjee* ... 138

'Santan', if limited to male descendant ; *See Will*, construction of ... 250

—— meaning of—If limited to male descendant ; *See Will*, construction of ... 250

Scandalous attacks upon Judges causing an obstruction to public justice ; *See Contempt of Court* ... 459

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| Second appeal— <i>Civil Procedure Code (Act V of 1908) Sec. 102—Declaratory suit—Mesne profits, claim for—Mesne profits valued less than Rs. 100—Technicalities.</i>                                                                         |       |
| A second appeal lies against a decree for <i>mesne profits</i> valued less than Rs. 500 in a suit in which the claim <i>inter alia</i> was for a declaration of title ; section 102 of the Code of Civil Procedure is no bar in such a case. |       |
| A Court is not bound by any technicalities with regard to the form of the statement of claim. <i>Sheikh Yakub v. Taimuddi Mullick</i> ...                                                                                                    | 105   |
| Sentence, if to be collective—Offence committed by several persons ; <i>See Ultra vires.</i> ...                                                                                                                                             | 215   |
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The plaintiff cannot evade the effect of section 78 of the Land Registration Act by recourse to the doctrine of estoppel.

The bar prescribed by section 78 of the Land Registration Act does not cease to be applicable, merely because the plaintiff establishes that the defendant has previously paid rent to him amicably, or because he brought the defendant upon the land. There is no question of estoppel, for the defendant does not dispute the title of the plaintiff; he relies only upon the statutory bar which places the plaintiff under disability. *Bangshi Badan Biswas v. Kamala Kanta Porohit* ... .. 60

- valuation of—*Court-fee—Suit for administration and accounts—'Suit for accounts'—Court-fees Act (VIII of 1870)*, Sec. 7 cl. (IV) (f).

A suit for administration and accounts is in essence a suit for accounts within the meaning of section 7 clause IV (f) of the Court-fees Act, and, in a suit of this description, the plaintiff is competent to value the claim for accounts approximately and to pay Court-fees thereon. If ultimately a decree should be passed in favour of the plaintiff for a larger amount than that covered by the court-fees already paid, the plaintiff would be precluded by the provisions of section 11 of the Court-fees Act from executing such decree until the fee payable on the whole amount of the decree had been paid. *Sarajubala Dasi v. Jogmaya Dasi*... 265

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- Ultra vires—*Calcutta Municipal Act, Sec. 559, Bye-laws 83 and 85—Continuance of performance at theatre after 1 a.m.—Liability to punishment for breach, whether joint or several.*

Bye-law 85 framed under section 559 cl. (52) of the Calcutta Municipal Act which is to the effect that every person guilty of a breach of any of the bye-laws shall be punishable with a fine which may extend to Rs. 20 and in case of continuing the breach with a fine of Rs. 10 for every day during which the breach continues after the continuance of the first breach, is not *ultra vires*.

Where several persons have been jointly convicted of a breach of bye-law 83 framed under section 559 of the Calcutta Municipal Act which prohibits the continuance of performance at a Theatre after 1 A.M., each person so convicted is liable under bye-law 85 to be punished with the maximum amount of the prescribed fine.

## Ultra vires—(Contd.).

Per Mookerjee J. (Woodroffe J. concurring). All who participate in the commission of a crime are severally responsible to the State, as though the crime has been committed by any one of them acting alone: there is *prima facie* no such thing as division of responsibility among the several participants in a crime. It is open to the legislature to depart from this principle and to rule that where a particular offence has been committed by several persons jointly, one collective sentence should be inflicted upon them jointly; but the legislative intent to depart from this principle must be established beyond all reasonable doubt. *Amrita Lal Bose v The Corporation of Calcutta* ... .. 215

Unjust and defamatory imputations on a Judge; *See Contempt of Court* ... 346

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— and vendee—Vendee, rights of, to documents of title—C. I. F. contract—Payment to be made afterwards; *See Contract* ... .. 62

Waqf Property—*Alienation, if valid—Refund of money—Charge.*

A mutwali cannot grant a valid *maurasi makarrari* lease of a waqf property

In this case, the succeeding mutwali was ordered to refund the *selami* paid for the *makarrari maurasi* lease executed by a previous Mutwali and was empowered to raise the sum by mortgage of the waqf property.

*Badal Mirza v. Tinkari Koley* ... .. 263

Warrant cancelled by Magistrate—District Magistrate's power to re-issue warrants—District Magistrate's power; *See Warrants, issue of* ... 114

Warrants, *issue of—Warrants, cancelled by the Magistrate—District Magistrate, power of, to re-issue warrants—Further enquiry, if essential.*

Where a Magistrate recalled warrants issued against the accused, the District Magistrate had no jurisdiction to set aside the order of withdrawal of the warrants and to direct the warrants to be re-issued. The course open to the District Magistrate was to order a further enquiry and after he had made such an order, he might have proceeded as the circumstances of the case justified. *Saharulla Chowdhury v. Keadra Santhal* ... .. 114

Water Cess—*Irrigation—Permanent settlement—Extent of zemindar's or inamdar's right of user under engagements with Government—River or stream belonging to Government—"Free of separate charge"—Madras Act VII of 1895, SS. 1, 2—"Standing and flowing water"—Madras Act III of 1905, S. 2,—Inams.*

The Government claimed under Madras Act VII of 1865 to levy water-cess upon permanently settled lands (*zeraiti* and *inam*) in so far as the user of Government water for irrigation exceeded the user at the time

## • Water Cess—(Contd.).

of the permanent settlement, whether in respect of the area irrigated or in respect of the fact that two crops were raised instead of one :

*Held* (agreeing with the Courts below, that the effect of the permanent settlement was to vest the then existing irrigation channels in the zemindars through or within whose zemindaris the same respectively passed or were situate.

*Held, also*, (in this differing from the Courts below) that the right of user from such irrigation channels which passed by the permanent settlement could be measured only by the physical conditions existing at that time and not by the extent to which the water was in fact used : and that assuming the river with which the channels connected belonged to the Government, the zemindar's right of taking water from it was limited only by the size of the channels and the nature of the sluices and works by which water was diverted from the river into the channels. The Government could not complain if the amount of water taken were within this limit. Once the water was lawfully taken into the channels, Government had nothing further to do with the matter.

Whether or not there are other cases which the first proviso to S. 1, of Madras Act VII of 1865 was intended to meet, it at least covers the case of engagements with the Government arising out of the permanent settlement. If by virtue of such settlement a zemindar is entitled to take and use water from any such source of supply as mentioned in the Cess Act and this right is part of or appurtenant to the property in respect of which he pays a single *jumma* or *peishkush*, no cess can be levied under the Act in respect of the water which he is so entitled to take and use.

*Semble*, that the second proviso is intended similarly to safeguard the raiyats' rights under the periodical temporary settlements.

Inams are Government grants subject to quit rents, and in some instances to services. They were not assessed for land revenue at the date of the permanent settlement. *Kandukuri Balasurya Prasadha Row v. The Secretary of State for India in Council* ... .. 290

*Will—Construction—Malik-o-qabiz, meaning of—Devise of whole estate to one person coupled with devise of a particular village to another—Repugnancy—Express conferment of powers of alienation upon general devise and omission of such power in case of particular devise—Whether such difference of language limits the interest of the particular devise.*

A testatrix described her title as "I am the sole owner in possession (*malik-o-qabiz*) of his (her deceased husband's) entire estate and possess all the proprietary powers" and bequeathed the entire estate of her husband to one Fateh Chand, with certain conditions, one of which was that "I shall continue to be the owner in possession of the entire estate the subject of the will and possess all powers such as those of making sales, mortgages, &c," and the condition was in the following terms :  
"I have bequeathed *Mansa Khudda*, with all the property to Musam-



## WILL—(Contd.).

mat Gomi...After my death she shall be the owner in possession (*malik-o-qabis*) of the entire property in *Mansa Khudda* aforesaid."

*Held*, that the words "*malik-o-qabis*" signify a full ownership in property ; that by condition 4 the village in question was absolutely bequeathed to Musammat Gomi ; the expressions as to powers of alienation by the testatrix neither abate from nor fortify the completeness of the ownership and possession of the testatrix, and, being words which are thus surplusage, should be omitted in construing condition 4 ; and that inasmuch as the entire estate devised to Fateh Chand was subject to conditions, an absolute gift of the village in question to another person was an exception but not repugnant to the bequest to Fateh Chand. *Fateh Chand v. Pandit Rup Chand* ... .. 182

—, *Construction of—Indian Succession Act, Secs. 88, 111—Hindu Wills Act—Bequest to a legatee on attaining majority—Absolute interest, if passes to the legatee—Contingent bequest—Period of distribution—Legacy, when can take effect—Sale in execution of a money decree—Right, title and interest of the judgment-debtor, purchase of—Reversionary interest if passes by the sale—"Santan" meaning of.*

A testator died leaving a minor daughter. By his will he appointed his brother executor to the estate left by him. The executor was directed to keep accounts of the income and expenditure of the movable and immovable properties left by the testator ; and the will further provided that "on my said daughter attaining her majority, he (the executor) will give her my estate and make over the accounts. If he should fail in that, he will be responsible in accordance with law. God forbid it, if my daughter should die childless, then my full brother will get the properties in my share."

*Held*, upon a construction of the will, that an absolute estate in the properties left by the testator passed to the testator's daughter on her attaining majority, and on the death of the said daughter without any issue, after attaining majority, no interest passed to the brother of the testator, inasmuch as under section 111 of the Indian Succession Act the gift in his favour could only take place before the estate was distributable, that is before the daughter received the estate by transfer from the executor under the provisions of the will.

The expression "right, title and interest of a judgment-debtor" in a property sold in execution of a decree ordinarily includes the reversionary interest, if any, of the judgment-debtor in the property sold.

The Bengali word "*Santan*" means issue generally, and is not limited to a male descendant. *Kumnd Krishna Mandal v. Jogendra Nath Sircar* ... 251

Writing causing a judicial officer to depart from the course of his judicial duty ;

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## ERRATA.

Page 97 l. 2 For "againsts" read "against."

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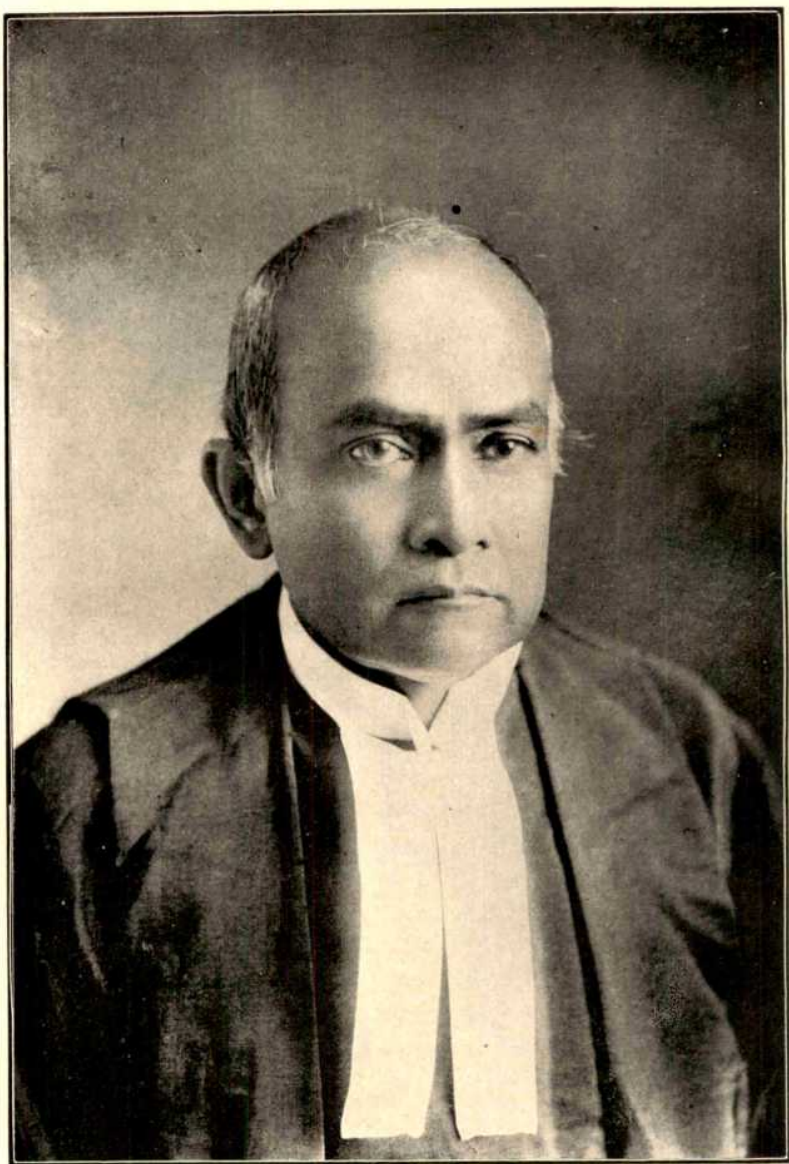
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The Hon'ble  
Mr. Justice Digambar Chatterjee, M.A., B.L.

# The Calcutta Law Journal.

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CALCUTTA, JULY, 1, 1917.

}{ NO. I.

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## **The Hon'ble Mr. Justice Digambar Chatterjée, M.A.B.L.**

We have great pleasure in presenting to our readers a portrait of the Hon'ble Mr. Justice Digambar Chatterjee who retired from the High Court Bench with effect from the 1st March, 1917 last.

The Vakils' Association presented him with a valedictory address on the occasion of his retirement, and we print below the full text of the address along with his Lordship's reply thereto which was eminently characteristic of him. Mr. Justice Chatterjee was elevated to the Bench on the 24th May, 1909, as an officiating judge, and his appointment was subsequently confirmed on the 11th August, 1909. To many his appointment came at the time as somewhat of a surprise, but the honour, unexpected as it was, was by no means undeserved, and now that his Lordship has retired from the Bench, it will be universally admitted that during the little less than eight years that he filled this important office, he worthily maintained the traditions of a Vakil Judge and fully justified the confidence which was reposed in him by the then Chief Justice Sir Lawrence Jenkins. Both when at the Bar and subsequently when on the Bench Mr. Justice Chatterjee was all along imbued with a very high sense of the dignity of the vocation of law, and it was no mere idle platitude that he uttered when, in his reply to the Vakils, his Lordship referred to the High Court as the "paladium of the rights and privileges of the people," and to the members of the profession as "the ever vigilant guardians of those rights and privileges, and the valiant and fearless champions of the poor and the oppressed." To say of a judge that he was independent or conscientious is no high praise, for these are qualities which we associate with the office of a judge as its inseparable concomitants; but Mr. Justice Chatterjee combined these qualities with a degree

of ability, learning and common sense that could not but make a striking impression on both litigants and practitioners. To the junior members of the profession Mr. Justice Chatterjee was at once a friend and a monitor: he would as freely bestow a compliment as he would administer a corrective. By two things his Lordship would set much store, on the part of a young practitioner, namely a thorough knowledge of the principles of jurisprudence, and a study of the records of a case. Trained in habits of careful thinking, Mr. Justice Chatterjee's judicial pronouncements were marked by a remarkable terseness of expression and directness of thought.

Mr. Justice Chatterjee was never in the best of health: even while a student he suffered from the effects of a weak constitution and was in fact prevented for one year from prosecuting his studies. Latterly, on the Bench, one could notice the heavy strain which he felt in struggling against the infirmities of declining health, and as he himself said, it was on the advice of his medical attendants, that he felt compelled to vacate his office before the completion of his term.

Mr. Justice Chatterjee was born on the 1st of July 1857 in village Maliara in the district of Bankura. After finishing an exceptionally brilliant career at the University, standing first in order of merit at successive examinations after matriculation, he joined the Calcutta High Court on the 31st of July 1882, which he left for a short period in 1885 on account of ill-health. At the Bar he was noted for his deep Sanskrit learning, and, as is well-known, translated the *Vivada Ratnakar* into English in collaboration with the late Babu Golap Chandra Sarkar Sastri, and wrote a book on *Mahimna Stotra*.

In his retirement now free from the cares of judicial office, we wish Mr. Justice Chatterjee a long life of peace and happiness.

#### The Address and the Reply are reproduced below :

On their Lordships taking their seats, Babu Ram Charan Mitra, Senior Government Pleader, read the following address on behalf of the Vakils of the High Court:

MY LORD,—It is with feelings of the deepest sorrow that we, the Vakils of this Court, approach your Lordship to bid you farewell on the eve of your retirement from the Bench.

Our feeling of regret at your retirement is all the more acute inasmuch as you have been compelled through ill-health to leave it sooner than you would otherwise have done.

Your career as a Judge has been characterised throughout by

great ability, strong common sense, thorough conscientiousness, marked independence, untiring patience and uniform courtesy,—qualities which have won for you the confidence and respect of the profession and the public.

You have brought to bear on the administration of justice in this Province your large experience as a successful practitioner, and your judicial utterances have been marked by an anxious desire to do justice.

And in taking leave of you we fervently hope and pray that yet many years of health, strength and happiness may be vouchsafed to you in your retirement.

[The address was printed on silk and tasselled in gold. It was presented in a handsome silver casket].

Mr. S. R. Das, Standing Counsel, on behalf of the members of the Bar associated himself with what had fallen from the senior Government Pleader.

Mr. Justice D. Chatterjee in reply, said:—I am heartily thankful to you for the many good things that you have said of me with so much feeling. I wish I could appropriate the whole of what you have said. I shall not, however, be so presumptuous as that. All that I can say is that I have tried my best to do my duty always remembering when trying the cases of litigants that I was myself under trial before an omniscient and unerring Judge. If I have succeeded in any degree it is due not a little to the cordial help that I have always received from the members of the profession and my learned colleagues on the Bench. If I have failed that is due not to the lack of help in these quarters, but it must be attributed to human frailty and latterly to the infirmities brought on by ill-health. I regret no less than you my premature exit from the Court, but for some time past I have been feeling a falling off from that high ideal of what a Judge of the High Court ought to be and it is that sense of declension combined with the unanimous advice of the doctors that has compelled me to retire before my time. Gentlemen, I have worked with you for more than thirty-five years and during all this time you have been uniformly kind to me. It is needless to say that I feel a wrench in my heart to separate from you, but I must separate once. My work in the Court is done and it is a relief to me that I retire with your assurance that I have not fallen off from the best traditions of a Vakil Judge. Gentlemen, I came to the Court with the name of God on my lips and I cannot depart from it without uttering His glorious name. May God bless the King-Emperor in whose name and by whose authority this Court has been dispensing justice: May God bless this Court and enable



it to stand as ever as the palladium of the rights and privileges of the people: May God bless the profession and enable its members to stand as ever the vigilant guardians of those rights and privileges and the valiant and fearless champions of the poor and the oppressed. Gentlemen, I again thank you very heartily for the kind feeling that you have expressed and for the nice gift you have made to me at the time of my retirement from the Bench and I will treasure the same as a token of your love and kindness.

The Chief Justice said: Mr. Justice Chatterjee, I desire to express my own personal regret that the relations which have always been of the most cordial nature between you and me are about to sever. On behalf of my brother Judges I wish to assure you that you carry with you the knowledge that you have earned the respect of all of us. You also carry with you our unanimous wishes that the rest and repose which you will now obtain will enable you to enjoy many years of happy and useful life.

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## REVIEWS.

**The Indian Evidence Act** by Ratanlal Ranchoddas and D. K. Thakore. Bombay Law Reporter Office, Bombay 1916.—The authors of this commentary have established their reputation by well-known works on Torts and crimes which have passed through many editions. Their new venture is likely to be equally successful as they have produced a book admirably suited to meet the needs of students. The comments are lucid and concise and are well calculated to throw light on difficult points. These are followed by the substance of the important Judicial decisions. We commend the work to all students of this difficult branch of law.

**The Provincial Insolvency Act** by R. J. Thakor. Butterworth & Co. Calcutta 1916.—The author has taken considerable pains to explain the provisions of the Provincial Insolvency Act in a limited compass. He has relied upon the second volume of the Laws of England for statement of the English law on the subject and obviously he could not have gone to a more reliable source, the book will be found useful by those who have neither time nor ability to take recourse to fuller commentaries.

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# The Calcutta Law Journal.

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## PHILOSOPHY AND LAW.

Law, in our country, is studied and taught as if it were a separate department of science (even if it is regarded as science at all) standing by itself without any connection to life or theory of life. As a student of philosophy who has just begun a serious study of law and as one having something to do with the teaching of law to our young men, perhaps I may be pardoned if I were to express my opinions on the subject.

Amongst the ancient people, who generally regarded law as a water-tight compartment, it was perhaps Aristotle who for the first time said in that masterpiece of his, the *Nicomachean Ethics* that law is connected with the life of the people. It is not a ready made, cut and dried substance having no life and growth. At every step its rigour, due to its universality, must have to be modified by considerations of equity and justice i. e. morality. But at the same time, we must have to attribute to him the doctrine of Natural Law, the *Jus Naturale* which, perhaps, more than anything else, ultimately led to that barren and life-less dogmatism of Wolffian philosophy which regarded life and law as two eternally "given" substances which must be studied in themselves, if studied at all—a doctrine which held sway over practically the whole of Europe till weakened by the critical rationalism of Kant and finally overthrown by the synthetic philosophy of Hegel.

The wave of synthetic philosophy which so mightily rolled over the whole of Europe, left insular England almost unaffected and there we find reiterated, even at the latter end of the Nineteenth Century, views on law which would have shamed even the old scholastic fathers whose views were shaped in accordance with the exigencies of the age. The question with which they started was, Is God bound by law? Their religious views could admit of one

answer, *viz.*, No, for law is the command of God. Gradually they extended the doctrine to the Pope—the chosen one of God and finally to the king—the representative of God. The views of Hobbes were nothing but the logical outcome of this doctrine and their practical application was in the upholding of the divine Right of kings, so persistently maintained by the Stuart Princes.

All these comfortable doctrines, however, received a very ready shock at the hands of the pioneers of the French Revolution headed by Jean Jacques Rousseau. Law, he said, cannot be made to depend upon any individual person's sweet will; it depends upon the consensus of will of all the individual members of the society and consequently the sovereign Power in the society is as much bound by law as the meanest individual. It will be found, however, that this doctrine leaves nearly untouched the all important question—what is the relation of law to the social life? Is it merely an instrument to regulate and perhaps to impede the social life and growth?

The slow and conservative minds of England, however, could not accept this revolutionary doctrine—not at least in its political aspect. The idea of kingship has been deeply rooted in the soil of England and no amount of socialistic philosophy could uproot it. And the result is that while in Germany and France there has been a fusion of philosophy and law and the latter is being studied as only a department of the former, English Jurisprudence seems contented enough in accepting and working upon the definition of law as “a command which obliges a person or persons to a course of conduct”—a definition that might as well have been given by St. Augustine himself.

Let us try and understand the definition just now quoted from Austin. To begin with, we must say that it is more a description than a definition. It tells us what form the law takes but it is entirely silent as to the why and the wherefore of law. If it is a command and nothing but a command—and that of a Superior Power—then all that we are expected to do is to obey it. It declares certain rights to which, under certain given circumstances, we are entitled and it prohibits us from committing certain offences. It has absolutely nothing to say about the cultural value which every human institution has and it ignores altogether the organic character of law and it reduces law to the level of a telegraphic code which possesses merely a local value and is meaningless to the uninitiated. To this unphilosophical view is due the rigour and inflexibility of English Common Law which in its turn gave rise to the absurd dual system

of Law and Equity in England. In one word, English jurists have systematically over-looked the fact that law, like any other social or political institution, has a certain purpose or end to serve. If it is a meaningless or purposeless command or injunction it loses its character as law. We must have to recognise that this universe, both animate and inanimate, is being governed by the law of causality and the law of purpose and the former is but an aspect of the latter. Is it not true that law is "making society as much as society is making laws? And why? Because, we answer, the legislature has set up a certain ideal which it is trying to realise in and through law. Dr. Jherring has so beautifully expressed this idea in his famous book "Law as a means to an End" (which, by the way, Professor Kohler characterises as an "amateurist platitude") that I need hardly make an apology for quoting a few lines in *extenso*. "One legal purpose is produced out of the other with the same necessity with which, according to the Darwinian Theory, one animal species is developed from the other. And if the world should be created a thousand times as it was once created,—after milliards of years the world of law would still bear the same form; for purpose has the same irresistible force for the creations of the will in Law as cause has for the formation of matter. Thousands of years may elapse before this compelling force of purpose becomes visible in a particular point in law—what are a thousand years in comparison with milliards? Law obeys this compulsion willingly or unwillingly. But the compulsion proceeds step-by step. Law knows no leaps any more than nature, the antecedent must be there first before the higher can follow: Law knows only one source and that is the practical one of purpose."

Now if we are agreed that law is not merely a blind command of a Sovereign Power and that there is a great Ideal behind it—the next question will be what is that Ideal or Purpose? It is possible, of course, to return different answers to this question.

Protection of individual rights and liberties, some jurists have said, is the object of law. But is this not merely an incidental aspect of the thing? Is it not a fact that law, in a sense, creates rights and liberties or at all event gives them the shapes that they possess? And further, is the whole function of law exhausted in protecting rights and liberties? Has it not a cultural value all its own—a value that is altogether independent of the protection of rights and liberties? Law of a nation, like its morality, is the sure index of the degree of culture and civilisation that it has attained. The law of an uncivilised and barbarous tribe, if indeed it has a law,

is characterised by inequality, absurdity and immorality, while the higher we go up in the scale of civilisation and culture the more purified becomes the law of the nation. Thus, we find that the horde-marriages and group-marriages of ancient days have now been replaced amongst the civilised nations by monogamic marriages. Law, therefore, we must say, is a historic factor in the life of a nation and which has for its ultimate object the advancement of civilisation and culture. From this point of view, the value of a comparative and historical study of the different systems of law and their growth and evolution, cannot be exaggerated and the service that has been rendered to the philosophy of law by the School of Savigny and his modern followers has been simply immense. We have now come to regard the institution of law of different nations in their proper light and to ascribe to each of them the value which it undoubtedly has; for there is no such thing as an entirely meaningless and valueless human institution. In its days, even the most barbarous and inhuman custom served its purpose and had its value. Take for instance the custom of polygamy. Is it not an absolutely necessary custom during the infancy of a nation when more individuals are required for its welfare and protection from attacks by aggressive neighbours? Thus, if we look into the matter deeply each custom—however meaningless and absurd it might appear to be—will reveal its secret and will show that it had its day and in that day it had its cultural value. This is the great truth which Savigny, Puchta and their followers have taught us, and it is this that has dealt the death-blow to the doctrine of *Jus Naturale*—as an eternal and immutable Principle, so strenuously advocated by Hugo, Grotius and others. Thus, it will be seen that the institution of law does not and cannot stand by itself—it is only a factor in the march of history and world-culture—the Evolution of the Absolute Idea as Hegel would call it. According to him the world-process is a progressive logical thought with a constant thesis and anti-thesis and eventual synthesis, so that in this way a continual evolution takes place from one to the other, an Evolution of the whole universe—physical and spiritual. Thus history becomes a magnificent growth out of which new ideas and new institutions continually spring which gradually so settle and clear, thus establishing an organic relation between the past and the future. These are the fundamental and basic ideas of that great master-mind which we must have to accept in our study of Law and Philosophy of Law. It is true no doubt, as Dr. Kohler points out with his usual acuteness, that the logic of world's history is mixed up with much that is

illogical\* but then that is merely a matter of historical detail which, in no way, militates against the main ideas of Hegel. It is only since Hegel that we have learnt the true nature of History and of law as a historical factor. Everything that was produced before his time was merely petty generalisation based upon mass of unconnected and undigested details. Law must free itself from such a petty empiricism if it wants a place in Universal Philosophy. We entirely agree with Kurkunov when he says that the method of Philosophy of Law ought not to be purely metaphysical but what we do maintain and urge is that law must be studied as a factor of history having growth and development under the laws of spiritual evolution and our view-point must be broad and philosophical. We put our plea in the words of the most eminent jurist of the present day thus. "The Salvation of the Philosophy of Law can only be accomplished by starting with the reconstruction of Hegel's doctrine and interpreting his doctrine of evolution to mean that mankind constantly progresses in culture in the sense that permanent cultural values are produced, and that man becomes more and more God-like in knowledge and mastery of the Earth. Only when based on this foundation can the requirements of the law be recognised as the requirements of the advancing culture which the law is to serve, and only in this way can the true aim of the law be known for what it is." After this discussion need we reiterate that the study of law apart from universal Philosophy or Theory of Life is an obsolete solecism which ought not to be adhered to anywhere? And we adapt here the famous saying of the sage of Greece Socrates "until either philosophers become kings or kings philosophers, states will never succeed in remedying their shortcomings" and say, "lawyers must become philosophers or philosophers lawyers in order that the study of law may be freed of the fruitless empirical and eclectic method which leads it no where.

SITARAM BANERJEE,

*Vakil, High Court.*

\* It is this perhaps that led Schopenhauer and afterwards Nietzsche to substitute a "Blind Will" in place of Hegel's 'Reason.' But is there not more reason than unreason in the march of History and world-culture?

## AN INTRODUCTION TO THE HISTORY OF HINDU LAW.

### *The Hindu conception of Positive Law.*

There is no definition given in the ancient Sanskrit Shastras of what is called "*Positive law*," in modern jurisprudence. "*Positive*

Hindu view of law.  
Dharma its derivation and meaning.

*law*," as understood by the Hindus, is included in their conception of what they understood by the term "*Dharma*" (धर्म). The word "*Dharma*" is derived from the Sanskrit root "*Dhri*," ( धृ ) meaning—"to hold, support or maintain." Etymologically, therefore, the word denotes "that which supports, that which holds together the peoples of the universe," as is stated in the Mahābhārata (1). It thus includes all kinds of rules—religious, moral, legal, physical, metaphysical, or scientific, in the same way as the term "*Law*" does in the widest sense, as indicated by the modern jurists, such as Austin (2) and Holland (3).

Law in the widest sense.

This conception of *Dharma*, or the root-principle according to which the whole universe is governed, was the earliest notion analogous to law known to humanity. While in Europe the vague general idea gradually specialised itself and we have '*the law of nature*,' '*the law of God*,' '*the social law*,' '*the law of Morality*,' '*the Positive law*,' as definite conceptions, distinct from each other, though having something in common to include them in the general conception of law in the widest sense, in India these special conceptions still form part and parcel of the same conception. Leaving out of consideration what are known as the *law of Nature*, meaning the rules that govern the physical world, the whole body of rules, regulating the life of a Hindu, in relation to civil conduct as well as to the performance of religious ceremonies, is included under the general name of *Dharma*.

Divine origin of law according to Hindus.

*Dharma*—law—was according to the theory of the Hindu jurists, *revealed by God* to the hoary sages of antiquity. The personages to whom any portion of the revelations was communicated, were called *Rishis* or inspired sages (4), and their names are preserved in the particular texts of which they were the inspired speakers. These revealed laws are technically known as the '*Srutis*' (स्मृतिः) which is derived from root *Sru* ( श्रु ) to hear, and signifies *what was heard*. So it is explained by the vedic commentator, *Sayana*, to mean the actual *words pronounced by God* which are eternal and having neither a beginning nor an end (5). Strictly speaking, the revealed laws are contained in the *Vedas* which are thence called the "*Sruti*" (6). The great Lexicographer Amara

(1). Karna Parva, Chapter LXIX. 59 :—" धीराणां धर्मो निष्ठा दुर्धरो धारयति प्रजा ".

(2). See Province of Jurisprudence determined.

(3). Holland's Jurisprudence, Chapter II—III.

(4). Cf. the etymological meaning of ऋषिः सन्तद्रष्टा

(5). *Sayana's* Introduction to his commentary on Rigveda, Maxmuller's Ed. Vol. I, 21.

(6). स्मृतिः वेदवाक्यान् धर्मोक्तवित्तिः

Sinha defining *Dharma* (धर्म) says that it means all the rules prescribed in the three *Vedas* (वेदः). In course of time, the inspired *Rishis* taught the law, thus revealed to them, to their pupils or disciples, who, with the aid of their memory transmitted them to their own disciples. Thus the sacred laws were preserved and transmitted from generation to generation and thence became known as the '*Smṛiti*', (स्मृतिः) that is, *what was remembered*. Although strictly speaking, the texts of the *Vedas* are the only revealed texts and the texts of the *Smṛitis* are not revealed, yet in theory the law contained in the texts of the *Smṛitis* is also treated as the *revealed law*, inasmuch as they are compiled from memory by sages who were perfectly familiar with the *Vedas* which were revealed to them. A presumption is, therefore, not unreasonably raised, that for every text of the *Smṛiti* there must be a corresponding text of the *Śruti* which is now lost or forgotten. The great *Jaimini* devotes an entire chapter of his *Darshana* in explaining how the law contained in the *unrevealed* texts of the *smṛitis* must be treated as burdening and his explanation has been elaborated by the commentator *Partha Sarathi Misra*.—"If the *Smṛitis* also contain the revealed law why then have not the very words of the original revelations that are supposed to be the foundation of the *Smṛitis* been preserved? The answer given is that human memory being frail, there is no wonder that *precepts* should be *remembered*, while the *exact words* in which they were originally expressed might be *forgotten* (1). From what has been stated above it is clear that according to the Hindu jurists the entire body of law, both religious and secular (*Dharma*) emanated from God. The great law-giver, *Manu* has given an account of the divine origin of his Code. *Brahma* having enacted that body of laws communicated it to him in the beginning, afterwards he taught it fully to several other holy sages (2).

The belief in the divine origin of all laws is not peculiar to the Hindus. The Bible and the Koran are believed, by the Christians and the Mahomedans respectively, to contain laws communicated by God to man. They find their parallel in the Pentateuch of the Jews. The Greeks also viewed their law as 'a discovery and gift of God' (3).

BERHAMPUR.

*Radharomon Mookerjee,*

*Vakil.*

1. *Mimamsa Darshana*, Book I, Chapter III : See *Partha Sarathi Misra's* Note to Sutra 1.

2. *Manu Samhitas*, Book I. 35, 58-60.

3. Demosthenes, *Adv. Aristogut*, 774 : Dig. i. 3. 2 : c.f. *Platos' Minos*, 314 c.



## REVIEWS.

**The Indian Court Fees Act and Suits Valuation Act** by Ram Kishan, Lahore. 1916—The commentator has industriously collected and arranged the principal decisions on these Acts and has furnished a creditable summary of their effect. The decisions of the Punjab Chief Court naturally figure very largely in the commentary and this feature of the book may make the work attractive to scholars outside that province.

**The Provincial Small Cause Courts Act** by M. M. Shafi. Second Edition by M. M. Rafi: Lahore, 1916—This is a very serviceable edition of the Provincial Small Cause Courts Act and reflects considerable credit on the editors. Every recent case of any importance appears to have been analysed and the arrangement of topics is all that could be desired. The work is absolutely up-to-date and in this respect has an advantage over other decisions.

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# The Calcutta Law Journal.

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VOL. XXVI. } CALCUTTA, OCT. NOV. & DEC., 1, 1917. } NOS. 3 to 11.

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## "OUR DAY."

Wednesday, 12th December, 1917.

We take this opportunity to draw the attention of our readers to the following appeal for the collection of funds required for the service of the sick and the wounded. Arguments are not needed to justify this great movement and we venture to express the hope that all our readers will contribute to the funds :

"EVERY one of us who is not fighting desires to make life easier for those who are, and our efforts are directed in the first instance to the care of the sick and the wounded.

Special collections have been organized under the patronage of the Joint War Committee which co-ordinates the work of the two great Associations devoted to the care of the sick and the wounded ; the British Red Cross Society and the St. John Ambulance Association.

Here in India the Viceroy as the head of the Indian Branch of this Joint War Committee has set apart a date, the 12th December, as a public holiday to be known as "Our Day"—the culminating point of a great financial campaign in India to collect funds for the service of the sick and the wounded.

The supreme object in view is the raising of a sum sufficient to meet the needs of the Red Cross Society and the St. John Ambulance Association in Mesopotamia and in India. Hitherto we in India have been assisted in this work by large contributions from Great Britain, but as the burdens on those in the west increase, it behoves us in India to do what we can to lighten those burdens and especially to supply funds sufficient to meet the expenditure necessary in Mesopotamia and in India.

The cost of these services in Mesopotamia is 2½ lakhs per mensem. The cost in India—in addition to the sums contributed in each Province to maintain the work done by the local branches—is

over 1 lakh: so that in addition to maintaining each their own local work—the Provinces of India must contribute at least 42 lakhs to the Central Fund.

Every Province is doing its share. Here in Bengal the local branch of the Joint War Committee is amalgamated with the organization of the Lady Carmichael Bengal Women's War Fund—whose work is so well-known. The work of the local branch includes the supply monthly of comforts and medical requirements direct to Hospitals and Field Ambulances in Mesopotamia—including a consignment of goods valued at Rs. 7,500 per mensem to the Red Cross Depot at Amara. In addition to this the Military Hospitals within the presidency (the Station Hospital, Calcutta, the Hospitals at Alipore, Dum Dum, Barrackpore, Jalapahar, Lebong) are supplied with necessary supplementary equipment and with the comforts for the patients, and much is done to help the sick and the needy on furlough. Apart from these regular services two motor launches have been supplied and various other special gifts in kind and money.

The cost of these services—quite apart from the cost of sending comforts to the troops—is estimated at  $2\frac{1}{2}$  lakhs per annum and from the collections which are made by the "Our Day" organization in Bengal, a sum of  $2\frac{1}{8}$  lakhs will first be paid for the maintenance of the Red Cross Work carried on by the Bengal Women's War Fund. But much more than this is required if Bengal is to maintain her position as the Premier Presidency in India: it is hoped that in addition to supporting the local work, Bengal will send to the central Committee a sum sufficient to maintain the work in Mesopotamia for at least one month, if not two. This means that Bengal must raise in the "Our Day" campaign a sum of at least 5 to 7 lakhs of rupees.

Before the issue of the "Our Day" appeal, the Lady Carmichael Bengal Women's War Fund Committee intended to ask for help at the beginning of 1918; now, however, if sufficient money is forthcoming and the "Our Day" appeal is successful, it will not be necessary to do so, as the  $2\frac{1}{8}$  lakhs mentioned will be sufficient to carry on their work of the local Red Cross for a further 12 months and the comforts department can well be kept going, by the usual monthly subscriptions and entertainments which are given throughout the year in aid of the Lady Carmichael Bengal Women's War Fund.

The organisation of the "Our Day" Campaign is under the Presidency of the Viceroy; the Commander-in-Chief is the Chairman of

the General Committee: Her Excellency the Lady Chelmsford is the President of the Executive Committee. In Bengal Her Excellency the Countess of Ronaldshay is the head of the Provincial Organization and a representative Committee has been formed by her to carry out the Campaign. To each member of this Committee a special Department of the Campaign will be allotted and he will be assisted in his work by a Sub-Committee chosen by himself.

The following are the members of the Committee:—

*President.*

Her Excellency the Countess of Ronaldshay.

*Vice-President.*

The Hon'ble Sir Hugh-Bray, Kt.

*Members.*

The Hon'ble Sir Lancelot Sanderson, Kt., K.C.

The Hon'ble Mr. Bhupendra Nath Basu.

The Hon'ble Rai Sita Nath Ray Bahadur.

The Hon'ble Mr. B. C. Mitter.

The Hon'ble Sir Archibald Birkmyre, Kt.

The Hon'ble Maharajadhiraja Bhahadur of Burdwan, K.C.S.I.,

K.C.I.E., I.O.M.

The Hon'ble Sir R. N. Mookerjee, K.C.I.E.

The Hon'ble Mr. F. W. Carter, C.I.E.

The Hon'ble Raja Hrishikesh Laha, C.I.E.

Brigadier-General R. G. Strange.

Captain E. J. C. Hordern, R.I.M.

Rai Hari Ram Goenka Bahadur, C.I.E.

Sir K. C. Bose, Kt., C.I.E., Rai Bahadur.

Sir Allan Arthur, Kt.

Mr. J. H. Wiggett.

Mr. A. G. Macpherson.

Mr. A. D. Pickford.

Mr. A. R. Murray.

Mr. B. A. White.

Mr. Surendra Nath Banerjee.

Babu Tarachand Ghanesamdas.

Babu Baldeodas Jugolkishore.

Mr. E. DuCasse.

Mr. J. F. Madan.

*Honorary Secretaries.*

Mr. W. E. Crum.

Captain H. G. Vaux.

*Honorary Treasurers.*

Bank of Bengal.

The great object is to give every one—no matter how small his resources may be—some opportunity of showing in a practical way his desire to help in the care of the sick and the wounded.

"Subscriptions, donations, etc., can either be sent to the Bank of Bengal or to Captain H. G. Vaux, Governor's Camp, Bengal."

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**DISTRIBUTION OF THE HIGH COURT BENCHES.**

Sanderson C. J. and Woodroffe, J.—Privy Council matters and Appeals from Original Side.

Chitty and Smither, JJ.—Second appeals from Groups II and III and Miscellaneous Appeals, and Rules (not relating to Regular Appeals) of the same Groups.

Fletcher and Shamsul Huda, JJ.—Regular appeals from Groups II and III and Rules relating to such appeals.

N. R. Chatterjea and Walmsley JJ.—Regular appeals from Groups I and IV and Rules relating to such appeals.

Teunon and Newbould JJ.—Appeals under Or. 41 R. 11 from all Groups; and Second Appeals from Groups I and IV and Miscellaneous Appeals and Rules (not relating to Regular Appeals) of the same Groups.

Richardson and Beachcroft JJ.—Criminal Business other than undefended cases and also all applications in connection with orders passed by Civil Courts under Secs. 195 and 476 Cr. P. C.

Chaudhuri J. and Greaves J.—Original Side.

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## JIMUTAVAHANA

Jimutavahana, the author of the celebrated Dayabhaga which will, says Dr. Jolly "always occupy one of the foremost ranks in Hindu Law literature, as being not only the leading authority of the Bengal School, but one of the most striking compositions in the whole department of Indian Jurisprudence" (1), is like many other Indian savants, a personage whose history is still hidden in deep obscurity. Even his age is as yet unsettled. Scholars have dragged him from the eleventh to the sixteenth century. Bengal, Konkan or Kanouj has each claimed him for its own.

Colebrooke, the pioneer in the field, identified the Bengal jurist with the son of Jimuta-ketu, a prince of the race of Silahara who reigned at Tagara (2), and with the materials then available placed him between Vijñanesvara and Raghunandana (3), Rajkumar Sarvadhicari fixed his age to be the beginning of the 15th century. "You may," says he, "view the Dayabhaga from any point you please, you cannot avoid coming to the beginning of the 15th century as the age of Jimutavahana (4), Prof Eggeling places him in the 15th or the beginning of the 16th century (5). In delivering the judgment of their Lordships of the Judicial Committee in a recent case, Mr. Ameer Ali remarked that Jimutavahana flourished five centuries after Vijñanesvara (6). The late Mr. Saroda Charan Mitra was of opinion that the Dayabhaga was written after the publication of the Mitakshara and that must have been at a period later than the 11th century and before the 16th century when Raghunandana flourished (7). "Jimutavahana cannot," says Dr. Jolly "be referred to an

(1) Jolly—Tagore Law Lectures, p. 15.

(2) Colebrooke's Digest (Madras Edn.) Preface, p. xx.

(3) Colebrooke's Dayabhaga (Sarkar's Edn.) Preface, pp. x, xi.

(4) Sarvadhicari—Tagore Law Lect., p. 403.

(5) India Office Catalogue, p. 460.

(6) *Ram Chandra v. Vinayak* 20 C. L. J. 573, 599.

(7) 22 L. Q. R. 50, 55.

earlier period than the 13th century" (1). Golap Chandra Sarkar was of opinion that Jimutavahana flourished about the middle of the 12th century (2). MM. Pandit Haraprasad Sastri places him in the early part of the 12th century (3). Mr. Monmohan Chakravarti is also of the same opinion (4). MM. Pandit Pramathanath Tarkabhushan thinks that Jimutavahana was alive in 1091 A. D. (5) Mr. Jogendra Chandra Ghose, in his *Hindu Law* just out, comes to the conclusion that Jimutavahana wrote the *Dayabhaga* under the patronage of Jalaluddin, the Mahomedan ruler of Bengal (6).

It is proposed to examine this latest determination of the age of Jimutavahana with the help of the materials that have been brought to light by the researches of scholars both Indian and European since 1793 when Colebrooke first published his *Digest of Hindu Law*. No apology is perhaps needed for such an attempt, as truth ought to be looked at from as many points of view as possible, and also because the question is of considerable importance to jurists and antiquarians alike.

The first thing that strikes the reader while going through the author's brief outline of the history of the Smṛiti literature of Bengal is the relative position that has been awarded to Jimutavahana, whose age is the subject-matter under discussion, with respect to Sulapani, another well-known writer of the Bengal School. "Sulapani must have preceded Jimutavahana for Sulapani," says the author, "does not even refer to the *Dayabhaga* or any of its opinions" (7). With great respect to the learned author, the conclusion does not follow from the premises: for we know that Sulapani, in his *Durgotsava-viveka* has quoted Jimutavahana by name more than once, (8). Sulapani has also referred to Jimutavahana's *Kala-viveka*

(1) Jolly—Tagore Law Lectures p. 22.

(2) Golap Ch. Sarkar—*Hindu Law* 3rd Ed. p.p. 27, 28; *Dayatattva*, (2nd Ed.) Preface, pp. xli, xlii.

(3) Report of the Asiatic Society, Bengal (1905) p. 10.

(4) Asiatic Society, Journal (N. S.) vol. XI, p. 311.

(5) *Kala-viveka* (Bib. Ind.) Preface, p. ix.

(6) J. C. Ghose.—*Principles of Hindu Law* (3rd Ed.) vol. I Introduction, p. xvi.; vol. II Introduction, p. xvi.

(7) Loc Cit. Introduction to vol I p. xvi.

(8) I "क्यासंख्ये रथौ वत्स यल्लामारथ्य नन्दिकाम्"

"नन्दिका," प्रतिपत् इति जीमूतबाह्वनः

*Durgotsava-viveka* Sanskrit College Manuscript (Catalogue No. II, 335) folio 5A: for Jimutavahana's interpretation referred to here, see *Kala-viveka* (Bibl Ind.) p. 513.

in the same book (1).

Another ground on which Sulapani has been placed prior to Jimutavahana is that Sulapani instead of following the peculiar doctrines of the Bengal School, follows, in the main, those of Vijñanesvara. He is of opinion that the Mitakshara prevailed in Bengal from the time of King Lakshmana Sena up to the time of Jalaluddin, the Mahomedan ruler ; and all the jurists that flourished in the intervening period, e. g. Halayudha and Sulapani, followed Vijñanesvara and not Jimutavahana. This view also seems to be untenable. In fact, if Sulapani and other Bengal writers had followed the Mitakshara, the standard writers of the Mithila School or of the Benares School who were, in general, close adherents of Vijñanesvara would not have been seen to be constantly engaged in refuting their doctrines not only on questions of inheritance but on other topics as well. Jimutavahana, Sulapani and others were generally referred to by them under the general designation of "the Eastern or Bengal writers," (प्राच्याः, गौड्याः) (2).

As an instance of the strong language used by these writers in controverting the opinions of the Eastern or Gauda lawyers, Dr. Jolly refers to Kamalakara who in his Vivada-tandava speaks of a certain doctrine held in the Bengal school as being "an absurd opinion originating in aversion to the Mitakshara" (3). Then again, certain opinions which have been viewed as peculiar to the Bengal School may be traced to Apararka's commentary and several instances of this special agreement of the Bengal doctrines with Aparaka may be

II. आरभ्य तस्यां दशमोऽयं यावत् ।

प्रपूजयेत् पर्वतराजपुत्री ॥

इति जीमूतवाहन धृतवचनात् ।

See Durgotsava-viveka (Sansk. College Manuscript) folio 3B.

(1) अकालपदश्च दक्षिणाद्यनपरं, ईशानां रानिलात् सद्विद्वत् कालविवेके...

Durgotsava-viveka (Sanskrit College Manuscript) folio 4B: for the corresponding discussion in Jimutavahana's Kala-viveka. See Kalaviveka (Bibl Ind. Ser) pp. 16, 111.

(2) जीमूतवाहनमूलपाणिखासंजीवनादयः प्राच्याः

Kamalakara's Vivada-Tandava quoted in Jolly—T. L. L. p. 21.

For Mithila writers : see for example Sridatta's Chhandogyanihika—Ind. Govt. MS. No. 2903, folios 8a, 43a (गौड्याः), 8b (गौडनिबन्धनी) 15a (गौडीयकृतिः) ।

Chandesvara's Kritya-Ratnakara Beng. As. Soc. MS. III D19, folio 206, 55a, 121b, (गौड्याः) 43b, 54b(2) and 96a (गौडवाक्यानि) 75a and 125a (गौडनिबन्ध) 111b, 149b (गौडकृतिः) ।

For प्राच्य see Sridatta's Acharadarsa (Benares Ed.), p. 166.

(3) निताचराप्रवेशं जीमूतं quoted in Jolly, T. L. Lectures p. 21.



found in Sulapani's commentary of the Yajnavalkya Smṛiti called Dīpa-Kalika (1).

The question whether Halayudha, the prime minister of Lakshmana Sena followed the Mitakshara or not cannot, at present, be satisfactorily answered one way or the other. Halayudha's book on Smṛiti has not yet been found and all that we know of it is from quotations. But even from these quotations, the conclusion seems to be that Halayudha generally follows Jimutavahana rather than Vijñanesvara. Thus Halayudha holds that, in a partition amongst brothers on the death of the father, only so much is to be given to the unmarried daughter as is necessary to defray her marriage expenses, and not a quarter share which follows on a literal interpretation of the texts of Manu and Yajnavalkya (2). Again both Halayudha and Sulapani follow Jimutavahana in holding that in a partition made by the father, an equal share must be given to the wife who has no male issue and not to the wife who has sons; while Chandesvara and Vāchaspati Misra both adopt the view of Vijñanesvara and hold that a mother is to get an equal share with her sons if she has not got any Stridhan (3).

It has been suggested that Jimutavahana at first studied under Srikara Misra and afterwards became his rival (4). The only material to support this assumption is possibly to be found in the explanation of the word Acharyya (professor) given by some of the late commentators of the Dayabhaga e.g., Rambhadra, Achyutananda, and Srikrishna (5). All that the commentators say is that Srikara Misra was an Acharyya: they do not say that he was the Acharyya under whom Jimutavahana studied. Moreover the way in which Jimutavahana has criticised the views of Srikara can hardly fit in with the theory that the latter was the teacher of the former. Srikara's views have been rejected with such remarks as inconsistent (असङ्गतं) (6)

(1) Jolly, Tagore L. Lectures p. 14.

(2) Colebrooke's Digest (Madras Ed.) Vol. II. p. 294.

(3) Colebrooke's Digest (Madr. Ed.) Vol. II. pp. 246, 247

(4) J. C. Ghose—Hindu Law Vol. I. Introduction p. xvii

(5) भाषार्थगौरवपराहत दायभागसूत्र प्रबोधजनरत्नमय श्रवणं ।  
Dayabhaga Chap. XV.

भाषार्थाणां, श्रीकरमिश्रादीनां—Srikrishna.

भाषार्थेति, श्रीकरभाष्यः यदुक्तं—Achyutananda; भाषार्थेति, श्रीकरमिश्रादीनां गौरवेष...

&c.—Rambhadra. See Dayabhaga (Bharat Siromani's Ed.)

(6) धार्यमाणत्वं तत्र साध्यमिति श्रीकरः तदसङ्गतं—Vyavahara-Matrika (Edited by

contemptible (६) (१) and so on. Then again if Jimutavahana be the contemporary of the same Srikara Misra who has been quoted by Vijñanesvara, Jimutavahana cannot be of the time of Jalaluddin.

And this leads us to the view according to which it is thought that the commentators of Jimutavahana are of opinion that the author of the Dayabhaga often refers to and recites the doctrines of Chandesvara and Vachaspati Misra. This view did not find much favour with Colebrooke (2) but has been accepted by Sarvadhicari (3) and Mr. J. C. Ghose (4). Neither Vachaspati Misra nor Chandesvara has been quoted by name by Jimutavahana : on the contrary, Jimutavahana has been quoted, as already shewn, by Sulapani and Sulapani's Sraddha-viveka has been quoted nearly twenty times in the Sraddha Chintamani of Vachaspati Misra. Then again Vachaspati Misra's son Lakshmi Das wrote in 1501 A.D. the Ganita-tattva Chintamani (5), so that he could not have been referred to by Jimutavahana because, if even a manuscript of his work Kalaviveka is older than 1417 Saka or 1495 A. D., the treatise must be still older (6). It can, therefore, be reasonably said that if the commentators had meant to refer to Vachaspati Misra in person, it was due to their ignorance about historical sequence. It may however, be noted that it is possible to interpret the statements of the commentators otherwise and to hold that they were merely referring to old opinions of the school as recorded by Chandesvara or Vachaspati Misra. The ancient customs recorded by the Mithila writers, Chandesvara and others, did not originate with them, but had existed from a long time. Thus the commentators say, "opinion approved of by Chandesvara and others" (7), "the ancient doctrine dealt with by Chandesvara and others" (8), and so on.

Justice Sir Asutosh Mookerjee published in Memoirs, As. Soc. of Bengal, Vol. III No. 5 p. 292 ; इति श्रीकरोदाहरणं श्रीकरचं तदसङ्गतं—loc. cit. p. 302 ; See also Dayabhaga Chap. XI, Sec. V, 17.

(1) तस्यात् श्रीकरमिश्रोक्तं इयं—Vyavahara Matrika p. 346.

(2) Colebrooke's Dayabhaga (Sarkar's Ed.) Preface p.x.

(3) Sarvadhicari—T. L. Lect p. 402.

(4) J. C. Ghose—Hindu Law vol II Introduction.

(5) Monmohan Chakravarti—Smriti Literature of Mithila, Journal As. Soc. Bengal (N.S.) Vol. XI p. 399.

(6) This manuscript is Ind. Govt M.S. No. 1568. The manuscript is not dated but has, at the end, a chart of nativity of a son born to one Chatak Sinha written in different ink dated Saka 1417. For the description, See Kalaviveka (Bibl.-Ind series) Introduction.

(7) इति सख्ये शरायमुदीतमपाकमुनाह (Achyutananda), Dayabhaga (Bharat Siromani's Ed.) Ch II, 27 p. 67 followed by Srikrishna loc. cit. p. 68.

(8) अथ च चक्षुःशरादिखद्विषय प्राचीनमतं अधिष्ठेमुनाह—See Dayabhaga Ch. IV, 3, 23, p. 169 (Bharat Siromani Ed.)

We meet with a curious remark that Jimutavahana had to go to Benares to study the Mimamsa system of philosophy. No evidence has been adduced although it can now be stated, and not without force, that Jimutavahana belonged to Rarh. In the *Kalaviveka*, Jimutavahana says that "in Rarh and other places the star Agastya (Canopus) rises in the last seven days of Bhadra, whereas in Ujjayini it rises in the last four days thereof" (1). This statement is repeated a little further down:—[In Ujjayini] when the sun has not reached the Kanya, 26 days of the Simha being gone, the (star) Agastya rises, after which the Arghya is to be offered. In Rarh and other places however, Arghya is to be offered when 23 days of Simha are passed" (2). One is tempted to think that Jimutavahana is here making local corrections, suitable to his home-land, of the observations obtained in the Ujjayini Observatory. The location of the village of Pari by Golap Chandra Sircar also points to the same conclusion (3). Was Rarh, so backward then in culture as to drive Jimutavahana to Benares to study the Mimamsa?

Again, it has been suggested that Jimutavahana got the idea of writing a separate treatise on *Kala* at Benares from the Dikshitas. His book, however, refers to a number of writers other than Dikshita who wrote treatises on *Kala*. At one place he has joined together seven of them and says: "The ascertainment of *Kala* by Jitendriya, Sankhadhara, Andhuka, Sambhrama, Harivamsa, Dhabala, and Yogloka is now shewn to be unsubstantial (4). One of these Andhuka Bhatta is now known to have lived in 952 Saka or 1030 A.D. (5) and all of them seem to be Bengal writers, for they have not been quoted by lawyers of other schools. Alberuni also, who was born in 973 A.D. (6) in his book devotes separate chapters to the discussion

(1) किञ्च ऋग्वेदोदयस्य देशभेदे नानियतकालत्वात् । तत्राह्नि रात्रादिषु सप्तदिनावशिष्टे भाद्रे तस्योदयः । उज्जयिन्यान्तु दिनचतुष्टयावशिष्ट इत्यन्तरमेव वाच्यम्—*Kala-viveka* (Bibl. Ind. Ser.) p. 290.

(2) (उज्जयिन्यां) कल्पाभगते सूर्यो सिंहस्य षड्विंशतिदिनेषु गतेष्वगस्त्योदयः सदनस्य ऋच्यः दीयः, रात्रादिषु तु सिंहस्य त्रयोविंशतिदिनेषु गतेषुदयो भवति—loc. cit. p. 291.

(3) Sarkar—*Hindu Law* 3rd Ed. pp. 27, 28 : Dayatattva (2nd Ed.) preface pp. xli et seq.

(4) नितेन्द्रियशङ्करान्युक्तसम्प्रदायविरचयधनयोप्रोक्तैः ।

ज्ञातमपि कालनिर्णयमधुना निःसारतां याति ॥

*Kalaviveka* (Bibl. Ind. Ser.) p. 380.

(5) हापचायत् षड्विंशत्यवतथकाय्दे षण्मुकादिर्दशितवान्—*Kalaviveka* pp. 50, 51.

(6) Alberuni India (Dr. Sachau's Ed.) Preface p. viii.

of festivals and festive days, subjects that are dwelt on in treatises on *Kala* (1).

The fact that Jimutavahana has quoted Govindaraja's commentary of the Code of Manu should not stand in the way of Jimutavahana's being prior to the 13th century as has been supposed by Dr. Jolly (2) and Mr. J. C. Ghose. Dr. Buhler does not agree with Dr. Jolly in the opinion of the latter that Govindaraja lived in the 12th or 13th century (3). Govindaraja is the son of Bhatta Madhava and the son of a Bhatta can only be a Brahmana and cannot be identified with the Kshatriya king either of Benares or of Kanauj (4). Besides Aniruddha Bhatta has quoted Govindaraja and Aniruddha was the Guru of Vallala Sena (5). In agreement with his theory about the late age of Jimutavahana, Mr. Ghose explains the peculiar doctrines of Jimutavahana as being the direct result of the prevailing Muhammadan influence (6). The late Mr. Sarada Charan Mitra was of opinion that the advanced views of Jimutavahana was due to the prevalence of the Tantric system in Bengal (7). The Buddhist law of Burma also recognises individual ownership and rights of inheritance of females, and Buddha Ghosha, a Bengali Buddhist, is reported to have been called to the Courts of Pagan and of the king of Siam for the purpose of settling disputed points of law (8). The Jaina law also recognises individual ownership (9). The theory of Muhammadan influence is, therefore, not inevitable.

We search in vain to find any discussion of the materials that are to be found in the *Kala-viveka* as well as in the *Vyavahara Matrika*. Jimutavahana has mentioned the Saka years 1013 and 1014 in his *Kalaviveka*. The following events are noted by him to have happened in 1014 Saka or 1092 A. D.

(1) Cf. Chap LVII of Alberuni's India which deals with the heliacal rising of Agastya and the ceremonies which the Hindus practise at such a moment, with the chapter of अमरीक्ष in *Kalaviveka*.

(2) Dr. Jolly—Tagore Law Lect. p. 22.

(3) Buhler—Manu Introduction p. cxxvii.

(4) Loc. cit. ; see also *Kalaviveka*—Preface.

(5) तामि भोजदेवविश्वरूपगोविन्दराजकासधेनुकृतिः अलिखितत्वात् सत्सपुराणवचनविरोधाच्च निम्नोक्त्येव—Haralata (Bibl Ind Ser p. 117) इति गोविन्दराजलिखितं ब्रह्मप्रवेगोवचनात् loc. cit. p. 166 ; इति तत् गोविन्दराजलिखितपकारः न लिखितं ब्रह्मसूत्रदेव प्रतिभाति, loc. cit. p. 174. In the *Dana Sagara*, Aniruddha has been called the Guru by Vallala Sena. See Haralata, Introduction.

(6) J. C. Ghose—Hindu Law Vol. I. Intro p. xviii

(7) 21 L. Q. R. 380 ; 22 L. Q. R. 50.

(8) Jolly—T. L. Lectures p. 292.

(9) See Arhanitti printed in J. C. Ghose's Hindu Law Vol. II.

## Date

## Event.

**Baisakha**—On the full-moon day, the moon was in *Hasta* (जुहा) and *Chitra* (चित्रा) (1) and during the last 13 *dandas* the moon was in that portion of *Chitra* (चित्रा) which falls within the constellation *Tula* (तुला) (2).

**Jaistha**—On the full-moon day, the moon was in *Svati* (स्वाती) and *Bisakha* (विशाखा) but during the last 8 *dandas* the moon was in that portion of *Bisakha* (विशाखा) which is in *Brischika* (वृश्चिक) (3).

The last day (संप्रान्ति) was also a full moon day, the moon was at first in *Svati* (स्वाती) and afterwards when the sun left the constellation of *Brisha* (वृष), the moon was at first in *Anuradha* (अनुराधा) for a *danda* or two (4).

**Asarh**—On the full-moon day, the moon was in *Purcasha* (पूर्वाषाढा) and *Uttar-asharha* (उत्तराषाढा) (5).

**Shravan**—On the full-moon day, the moon was in *Shravana* (श्रवणा) and *Dhanistha* (धनिष्ठा) (5).

**Bhadra**—On the full-moon day, the moon was in *Satavisha* (शतभिषा) and *Purvabhadrapada* (पूर्वभाद्रपद) (6).

On the day of the new-moon, 14th *tithi* (चतुर्दशी) lasted for 2 or 3 *dandas*, and then new moon *tithi* (अमावस्या) lasted for 7 *dandas* in *Ashlesha* (अश्लेषा) and then in *Magha* (मघा) (7).

**Asvin**—On the full-moon day, the moon was at first in *Uttarabhadrapada* (उत्तरभाद्रपद) (6).

**Kartik**—On the full-moon day, the moon was in *Asvini* (अश्विनी) and *Bharani* (भरणी) (8).

(1) तदनन्तरं मेघसूर्य जुहाचिवाभ्यां युक्ता पूर्णिमा—*Kalaviveka* p. 45.

(2) तथा चतुर्दशीत्तरसहस्राब्दादी मेघसूर्य पूर्णिमा जुहाचिवाभ्यां व्याप्ता, तत्र तुला-सम्बन्धिनश्चिवापराईस्व तथोदयदृष्ट्या एव परं पूर्णिमान्ते सूताः—*loc. cit.* pp. 46, 47.

(3) तत्रतत्पर एव वृषसूर्य पूर्णिमा स्वातीविशाखाभ्यां व्याप्ता, तत्स्वार्थे विशाखापादद्वये तुलायाश्च द्वैः वृश्चिकसम्बन्धिविशाखाशेषैरष्टाभिरेव दृष्टैः परमन्ते व्याप्ता—*loc. cit.* p. 47.

(4) तस्मिन्नेवाह्ने वृषसंप्रान्तिदिने प्रथमं स्वातीयुक्ता पूर्णिमा...वृषशेषे च पूर्णिमा अनुराधा दृष्टैः कश्चिकयुक्ता प्रथमे—*loc. cit.* p. 43.

(5) मिथुनादित्यपूर्णिमाया आषाढद्वयव्याप्तत्वात् आषाढस्य कर्कटस्थसूर्ये च पीणमासाः श्रवणशनिष्ठाव्याप्तत्वेन श्रवणस्य च निर्विवादत्वात्—*loc. cit.* p. 44.

(6) तथा सिंघसूर्य शतभिषापूर्वभाद्रपदाभ्यां व्याप्तत्वाद्दशी भाद्र एव। कृत्वासूर्ये च प्रथमसुत्तरभाद्रपदयोगादसावपि भाद्र एव—*loc. cit.* p. 44.

(7) तथा च चतुर्दशीत्तरसहस्रकवत्सरे सिंघसूर्ये रवी त्रिदिदृष्ट्या चतुर्दशी परतो अमावस्या अश्लेषावससदृष्ट्या परतो मघा—*loc. cit.* p. 21.

(8) चतुर्दशीत्तरदशशतकाह्ने कार्तिके आह्ने तत्पूर्णिमा अश्विनीभरणीभ्यां व्याप्ता—*loc. cit.* p. 49.

## Date.

## Events.

On the 8th day of the solar month, the primary (मुख्य) lunar month began (1).

Agrahayan—On the full-moon day, the moon was in *Krittika* (कृत्तिका) and *Rohini* (रोहिणी) (2).

On the 7th day of the solar month, the primary lunar month began (2).

Pous—On the new-moon day, the moon was in *Jyestha* (ज्येष्ठा) and *Mula* (मूला) (3).

On the full-moon day, the moon was in *Ardra* (आर्द्रा) for the longer period and then in *Punarvasu* (पुनर्वसु) only for 13 *dandas* (4).

Magha—On the full-moon day, the moon was in *Pushya* (पुष्या) and *Ashlesha* (अश्लेषा) during equal intervals (5).

Falgun—On the full-moon day, the moon was in *Magha* (मघा) for 15 *dandas* and then for the longer interval in *Purva-phalguni* (पूर्वफल्गुनी) (6).

Chaitra—On the full-moon day, the moon was in *Uttar-phalguni* (उत्तरफल्गुनी) and *Hasta* (हस्ता) (7).

It is not necessary to give an account of the events that occurred in 1013 Saka—1091 A.D. that are found in the *Kala-viveka* (8). On going through the list given above, one thing that cannot fail to strike the reader is the minuteness of details with which the

(1) तथाहि चतुर्दशोत्तरसहस्रशकान्दे तुलास्यादित्याष्टमदिनोपक्रान्तस्य प्रतिपदादिदर्शान्मासस्य पौर्णमास्यत्रिनीभरणीभ्याम् व्याप्ता—loc. cit. pp. 49, 50.

(2) तदनन्तरितस्य हांसकादित्यसप्तमदिनोपक्रान्तस्य प्रतिपदादिदर्शान्मासस्य पुर्णिमा कृत्तिका रोहिणीभ्याम् व्याप्ता ।

(3) तत् (चतुर्दशोत्तरसहस्रशक) वत्सरे एव धनुः भास्करे ज्येष्ठा मूलाभ्यामाभावात्—loc. cit. p. 21.

(4) धनुःस्य भास्करे पौर्णमास्यां स्वशिरोमन्त्रं नास्ति च, आर्द्रायुक्ता तु सूर्योभिरवयवेः शेषे तु त्रयोदशदश्या एव परं पुनर्वसुव्याप्ताः—loc. cit. p. 42.

(5) मकरादित्ये च पुष्याश्च धाभ्याम् अश्लेषे व्याप्ता—loc. cit. p. 42.

(6) कुम्भस्यादित्ये हि पौर्णमास्याः पञ्चदशदश्या एव परं मघाव्याप्ताः पूर्वफल्गुन्या च भूयसानवयवानां योगात्—loc. cit. p. 43.

(7) मीनादित्ये तु पूर्णिमा उत्तरफल्गुनीहस्ताभ्याम् व्याप्ता—loc. cit. p. 43.

(8) See for instance : त्रयोदशोत्तरसहस्रशकान्दे मोनस्यै सूर्ये पूर्वोत्तरफल्गुनीभ्याम् व्याप्ता पूर्णिमा—loc. cit. p. 45.

तथाहि त्रयोदशोत्तरसहस्रशकान्ते मोनस्यै पूर्णिमा पूर्वोत्तरफल्गुनीभ्याम् व्याप्ता...तत्र पौर्णमास्याः शेषपञ्चदशदश्यायैव परं कम्बायाश्चन्द्र—loc. cit. p. 46.

events have been described. It will not, therefore, be rash to suppose that Jimutavahana, when he was writing these lines had before him some book from which he was quoting these facts for the purpose of illustrating the propositions under discussion. This book of reference will probably be a (पञ्चिका) (almanack), for a Brahmin Pandit in those days, as even now, had always with him a copy of the almanac for the current year as also those for a few years that had just passed. It also appears that the propositions that Jimutavahana is illustrating are very familiar, so that it will be natural that he would rather refer to current almanacs than hunt up old astronomical observations the correctness of which may be open to doubt. It may, therefore, be inferred that Jimutavahana was here referring to contemporaneous events and that he was alive in 1014 Saka—1092 A.D.

This determination of the age of Jimutavahana was first arrived at, although on different grounds by M. M. Pandit Pramathanath Tarkabhusana. "The internal evidence," he says "about the antiquity of Jimutavahana appears to be very strong. In the present work, in speaking of some astronomical observations made in the 10th century of the Saka Era he refers them to Andhuka Bhatta as the observer (1). But in speaking of certain observations made in 1013 to 1014 of the same era he simply says *Dristam* (दृष्ट) without referring to any body. The probability is that those observations were made by himself" (2). This conclusion corroborated by the materials already described receives a further support from the use of the word (लिख्यमान) (being written) in connection with the year 1014 Saka—1092 A.D. which shows as if the almanac of 1014 Saka was "being written" at the time Jimutavahana was composing his *Kalaviveka* (3).

Mr. Jogendra Chandra Ghose has dismissed these observations of the learned Editor of the *Kalaviveka* very summarily with the remark that Jimutavahana here simply referred to certain observations of past Eclipses: as far as I am aware, Jimutavahana or the editor has nowhere referred to an observation of any Eclipse. One is not to read between the lines to find, and not without, feeling pain, how Mr. Ghose has become humorous at the expense of the poor Brahmin Pandit (4).

(1) The learned Editor is here referring to such passages as एवंविधएव कान्तिको द्वापद्युदधिकनवमस्त संख्याति यकाब्दे अन्युकादिर्दशितवान्—*Kalaviveka* p. 51.

(2) *Kalaviveka* (Bibl. Ind.) Preface p. IX.

(3) दृष्टं तत् तथाहि चतुर्दशीतारसंज्ञकाक्षरे लिख्यमाने शुक्लमासकरी चरितौ भरणौ व्याप्ता पीठमासी—*Kalaviveka* p. 41.

(4) J. C. Ghose—*Hindu Law* Vol. II Introduction p. xvi etseq.

To test the correctness of this conclusion we may usefully compare it with the result that is obtained on a consideration of an entirely new and independent set of evidence ; and this has now been made possible by the publication of another work of Jimutavahana, namely the *Vyavahara Matrika*, by Justice Sir Asutosh Mookerji who, in the prefatory note, writes thus : "I may add that Jimutavahana refers to a number of Jurists not mentioned by any other author, for instance, Jitendriya, Yogloka, Balaka, Viswarupa, Srikara, Manjarikara. Of one of these, Yogloka, he controverts the views frequently, and in one instance where he does this, his views were subsequently controverted by Chintamani, which would seem to indicate that Jimutavahana preceded Chintamani" (1).

That the Nyaya system of Philosophy has greatly influenced the development of the Bengal school of jurisprudence has long been known and the fact did not escape the notice of Colebrooke. "In Eastern India," says he, "the Vedas and Mimamsas are less studied than in the South and the lawyers of Bengal adopt very generally the Nyaya or Dialectic Philosophy for rules of reasoning and interpretation upon questions of law. Hence arose two principal sects of schools which, construing the same text variously, deduced upon some important points of law different inferences from the same dicta or maxims" (2). It was in Eastern India that the Mimamsa system of Philosophy was secularised and Gotama's Nyaya born again to grow with new vigour. The translation of the sacrificial post and the Soma cups of the Vedic ceremonies into the wheel and the rod of the potter led to another ethereal world from which the savants of the East sought to find the true theory of light to guide them in their doubts, just as the translation of the tubes of force of Faraday into the language of mathematics by Maxwell led to the true theory of light which is now to guide the civilised world in their struggles of existence. From this overwhelming influence of the Nyaya system, Jimutavahana neither did nor could make himself free.

Unfortunately for us, this subject of the influence of Nyaya upon Smriti, although sure to be fruitful, has not yet attracted the attention of many scholars. "The wealth of materials which should be our pride is now our disgrace" (3). It is, therefore, with the greatest reluctance and after much hesitation, that I make bold to set forth a

(1) *Vyavahara—Matrika of Jimutavahana—Memoirs of the As. Soc. of Bengal* Vol. III No. 5 pp. 277-353—Prefatory Note p. ii.

(2) Colebrooke's *Digest* (Madras Edn. Vol. I p. 5 note (5) etseq : *Strange's Hindu Law* Vol. I p. 316 (3rd Edn.)

(3) Sir Rashbehary Ghose—*Law of Mortgage* (4th Edn.) Vol. I p. 63.



few materials with the object of following out the suggestion and comparing the result with that already obtained.

Jimutavahana must have flourished before the advent of the school of Neo-Nyaya (नव्याय), His definition of "Inference" stamps him out as belonging to the old school. "Inference" says he, "is made if and when there arises the knowledge of fire from the presence of smoke on the ground that there is invariable concomitance (अविनाभाव) between smoke and fire (1). This invariable concomitance (अविनाभाव) is, it is well known, according to Buddhistic Logic the basis of Inference (2). Gangesha Upadhyaya in his Tattva-chintamani first gives the most complete definition of the basis of Inference. The अविनाभाव of Buddhistic Logic now and henceforward came to be known by the name of *vyapti* (व्याप्ति); Jimutavahana's conception of "Inference" is, therefore, older than that of Gangesha and it cannot be reasonably supposed that Jimutavahana would stick to the older theory even after the establishment of a better one by Gangesha.

The illustration referred to by Justice Sir Asutosh Mookerjee is, if I may say so without impropriety or offence, still stronger; for here Jimutavahana is controverting a theory that is now known to be a special case of the theory propounded by Gangesha. While discussing the true conception of पक्षता (the characteristic of the subject of the conclusion requisite for a valid inference), Gangesha defines पक्षता to mean the "non-existence of determination accompanied by the absence of the desire to infer (3). Analysing this definition, it appears that there is पक्षता and so inference is possible in the three following cases:—

(1) When there is no determination (निश्चिन्नि) but desire to infer (सिद्धावधिषा) as in the typical case: the hill is fiery, because it is smoky. Here (a) there is no determination, for we have not the knowledge of fire and (b) there is desire to infer.

(2) When there is no determination and no desire to infer. As soon as we hear the clap of thunder we infer that there are clouds in the sky. Here (a) there is no determination, for we do not see the clouds and also (b) there is no desire to infer although we are naturally led to that conclusion (4).

(1) वृत्तार्थवृत्तिविज्ञानम् अथविनाभावपुरस्कारेण जायते तदनुमानं Vyavahara. Matrika p. 304.

(2) See. Dr. B. Seal—Positive Sciences of the Ancient Hindus p. 254 et seq; Madhavacharyya—Sarvadarshan. Sangraha (translated by Cowell) p. 12 et seq.

(3) सिद्धावधिषाविरहसङ्कलितसाधकप्रमाणाभावो व्याप्ति स पक्षः—Gangesha पक्षता (Jibananda Vidyasagar's Ed.) p. 2.

(4) सिद्धावधिषाविरहोऽपि घनमज्जितेन मीधःकुमानात्...Gangesha—पक्षता।

(3) When there is determination but still desire to infer as ;— We see the elephant as well as hear his roar, still we may have desire to infer the presence of the elephant from his roar (1).

Of these three cases, only the first or the typical case has been accepted by Jimutavahana (2) and he rejects the second case which was, we know from him, the view of Yogloka whom he calls a pseudo-logician (3). Jimutavahana would not have used this strong language, had he lived after Gangesha, in criticising Yogloka who was supported by Gangesha in this opinion.

Jimutavahana's definition of thesis (प्रतिज्ञा) ought also to be noted in this connection. He adopts the old definition given by Gotama according to which "the thesis is the statement of that which is to be proved" (4). Gangesha criticises this definition as being too wide for, according to him, it is equally applicable to the major term (5).

Jimutavahana has drawn largely from the old school of Nyaya. Thus while enumerating the defects of pleadings, he utilises almost all the technical terms by which fallacies of reasoning are named in old logic (6).

It is not necessary, however, to pursue this question any further seeing that the illustrations already given are sufficient to establish the proposition that Jimutavahana preceded Gangesha.

(1) प्रत्यक्ष परिकल्पितमपि चक्षुमनुमानेन ; सूत्रसूत्रे तर्करसिका: Gangesha...पक्षता ।

(2) सिद्धावधिषितधर्मविशेष एव धर्मो पक्षः—Vyavahara Matrika, p 292.

(3) एतेन यत् सात्त्विकमन्त्रेण योग्लोकेनाभिहितं न च प्रतिपिपादयितधर्मो धर्मो पक्षः, स्वार्थानुमानविशेषे अनुरभिगन्तानुमेये कृतमितरसानुमाने प्रतिपित्वाया अनुपपत्तेः—Vyavahara Matrika p 291.

(4) प्रतिज्ञा साध्यनिर्देशः—Vyavahara-Matrika p. 292: Comp. Gotama Nyaya Sutras 1st Adhyaya, 1st Ahnika Sutra. No. 33.

(5) तत्र प्रतिज्ञा न साध्यनिर्देशः साध्यपदे अतिव्याप्तिः । Gangesha Tattva-chintamani : See also Vanamali Chakravarti—The Pramans of Hindu Logic—As. Soc. Bengal Journal vol. vi, pp. 299, 292.

(6) The fallacies of reasoning are enumerated thus : Gotama—Nyaya Sutras 5th Adhyaya, 2nd Ahnika Sutra, No. 1.

प्रतिज्ञाहानिः प्रतिज्ञान्तरं प्रतिज्ञाविरोधः प्रतिज्ञासम्यासो हेतुलभरं अर्थान्तरं

(1) (2) (3) (4) (5) (6)

निरर्थकम् अविज्ञाताद्यै अपार्थक्यं अप्राप्तकालं न्यूनम् अधिकं पुनरुक्तं

(7) (8) (9) (10) (11) (12) (13)

अननुमाद्यर्थं अज्ञानम् अप्रतिभा विक्षेपः मत्तानुज्ञा पर्यनुयोष्योपेक्ष

(14) (15) (16) (17) (18) (19)

निरनुयोष्यानुयोगः अपसिद्धान्तः हेतुमासाद्य-निरवस्थानानि

(20) (21) (22)

Compare प्रतिज्ञादूषणानि च परस्परविरुद्धार्थप्रयोग-प्रतिज्ञान्तरकरण-प्रतिज्ञाहानि-

The author of *Tattva-chintamani* has referred to Ananda Suri and Amar Chandra Suri nicknamed as the "lion-cub" and the "tiger-cub." These Jain logicians flourished at the beginning of the 12th century because Siddharaj from whom they received their nicknames ascended the throne in Samvat 1150 or 1093 A.D. (1). We have already seen that Jimutavahana gives a detailed account of the year 1014 Saka or 1092 A. D. so that the assumption that he was living at that time makes him a contemporary of Sidharaj and the Jain logicians Anand Suri and Amarchand Suri and is quite consistent with the conclusion that Jimutavahana preceded Gangesha.

Again Gangesha refers to Khandana Khanda Khadya of Sriharsa (2). Sriharsa flourished during the reign of King Vijaya Sena of Bengal as appears from the *Naishadha Charita* (3). Jimutavahana seems therefore, to be contemporary of Sriharsa both flourishing during the reign of Vijaya Sena contemporary of Nanya-deva of Mithila, who was reigning in 1097 A. D. for we know of a manuscript written in that year (4).

The passage from Eru Misra quoted in Golap Chandra Sarcar's *Hindu Law* corroborates this result ; for there it is stated that Jimutavahana was the Chief Judge during the reign of Visvakasena, ruler of Gaura who may be identified with Sooksen of the *Aini*

प्रतिज्ञासम्प्रदाय-प्रवर्धयति विधिष्वहकप्रमाणं विरोध विरोधिष्वर्थात्तरयाहकप्रमाणवाचितत्वादौ ।  
 "प्रतिज्ञाहानिसम्प्रदायं सर्वविरोधान्तराणि च । प्रतिज्ञादोषमध्ये किं वसनेतामि नोचिर" ॥  
*Vyavahara Matr*, p. 292 ; प्रतिज्ञातमर्थं न्यूनमधिकं वा न कुर्यात् loc cit. p. 292.

(1) Dr. S. C. Vidyabhushan—*History of Indian Logic—Mediaeval School* p. 47.

(2) इति खण्डनकारमतमपि अपाक्षम्—*Tattva-chintamani As. Soc. of Bengal* Ed. p. 233.

(3) श्रीहर्षं कविराजं राज्ञि मुकुटाक्षकारहोरः सुतम्  
 श्रीहोरः सुपुत्रे जितेन्द्रियचयं सामग्रीदेवी च यम् ।  
 गौरीवैशकुलं प्रशंसि भणित्तिधातयं तन्महा-  
 काव्यं चाक्षणि वैरक्षेणचरिते सर्गैर्ममत् सप्तमः ॥

*Naisadha Charita* 7th Canto last sloka. This King of Gaura is King Vijaya Sena as will appear from the following couplet.

तस्य श्री विजयप्रशंसि रचसातातस्य नव्ये महा-  
 काव्ये चाक्षणि नैषधीय चरिते सर्गैर्ममत् पञ्चमः ॥

*Naisadha-charita* Canto 5 last sloka.

(4) Pischel—*Katalog der Bibliothek der Deutschen Morgenlandischen Gesellschaft* vol. II p. 8 ; R. D. Banerji—*History of Bengal* vol. I p. 290.

Akbari or Vijayasena of modern history (1). Tradition also points out Visvakasena to be the father of Vallala Sena (2).

The materials that have been collected by the patient researches of scholars since Colebrooke first took up the subject all point to the same conclusion ; namely, that Jimutavahana flourished during the latter part of the 11th century during the reign of King Vijaya Sena of Bengal. Colebrooke himself also apprehended that the founder of the Bengal School might be a contemporary of Vijñanesvara. Referring to the opinion that the commentators of the Dayabhaga suppose its author in many places to be occupied in refuting the doctrines of the Mitakshara—a similar opinion about Chandesvara and Vachaspati Misra has already been shown to be incorrect—Colebrooke says : “ It is possible that he (Jimutavahana) may be there refuting the doctrines of earlier authors which may have subsequently been repeated from them in the later compilation of Vijñanesvara ” (3).

Again, the opinion of the learned in Bengal was even then not very different : for they were, as Colebrooke says, “ inclined to suppose that the author may have been a professed lawyer who performed the function of judge and legal adviser to one of the most celebrated of the Hindu Sovereigns of Bengal ” (4). Colebrooke, however, with the precision of a mathematician, could not accept this hypothesis, not because it was absurd, but because, as he says, “ no evidence has been adduced in support of this opinion ” (5). It is, therefore, gratifying to see that the facts now brought to light only fulfil one of the prophetic suggestions of the pioneer in the field.

HIGH COURT, CALCUTTA.

*Panchanan Ghose,*  
Vakil.

(1) According to the Aini Akbari, there was a King of the name of Sook Sen who just preceded Vallala Sena. Sook Sen has been identified with Vijaya Sena, by Dr. Rajendra Lal Mitra—See his Indo-Aryan Researches, vol. II.

(2) আদিশূরের রাজ্যকাল, সেনবংশ ভাঙ্গা।

বিষ্ণুসেনের ক্ষেত্রজপুত্র, বল্লালসেন রাজা ॥

On the destruction of Adisur's kingdom, rose the Sena dynasty in power ; Vallala Sena, *kshetraja* son of Visvaka Sena, became the Raja.

Quoted in Nagendra Nath Vasu—Castes and Sects of Bengal Vol. I, p. 319.

(3) Colebrooke—Dayabhaga Preface p. X.

(4) Colebrooke—Dayabhaga, p. x.

(5) Loc. Cit.

## REVIEWS

**The Indian Decisions**—Old Series, Vol. 17, New Series (Madras 2 Vols.)—We are pleased to find that notwithstanding the difficulties created by the war the republication of the valuable old reports continues to make a steady progress. The 17th Vol. of the old series reproduces the first half of Vol. 14 of the Bengal Sadar Dewany Adalat Reports. The 2 volumes of the new Series now before us reproduce the contents of all the eight volumes of the Madras High Court Reports. It is sufficient to say that the volumes have been produced in the best style of the Law Printing House and that the high quality of the editorial matter has been maintained.

**The All India Civil Court Manual** by T. V. Sanjiva Rao—Imperial Acts Vol. II—3rd Edition, 1917.—This volume completes the new edition of Mr. Sanjiva Rao's All India Civil Court Manual. The text of the Acts has been revised throughout and the brief annotations have been brought up to date. It is now well-known that the work is absolutely indispensable to the practising lawyer and the improvement effected in the new edition well sustains the deservedly high reputation of the world.

**The Law of Receivers** by Samanath Sastri and Ramanath Aiyer, Law Printing House, Madras.—This is a new volume of the Lawyers Companion Series and sets forth exhaustively the Law of Receivers in British India. The treatise is divided into thirty-two chapters which cover 679 pages. The leading principles are fully explained and are illustrated by quotations not only from Indian decisions but also, from those of British and American Courts. The introductory chapter is particularly valuable and gives an interesting general survey. There are full tables of cases and index and the appendices set out the statutory provisions on the subject, rules, orders and forms. On the whole the volume which is very decently got up is likely to prove extremely useful to the practitioner as also to the advanced student.

**The Law of Arbitration** by A. K. Nanniah, Law Printing House, Madras. This is a fresh addition to the well-known Lawyers Companion Series published by the enterprising Madras firm known as the Law Printing House. The author has set out the text of the Indian Arbitration Act and the provisions of the Civil Procedure Code relating to arbitration and has annotated them by reference to Indian and English cases. The notes are fully and are well arranged. We have tested them in many places and found them accurate.